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Supreme Court, U.S.
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No. 03-

IN THE
Supreme Court of the United States

WASHINGTON-DULLES TRANSPORTATION, LTD.,

Petitioner,

v.

WASHINGTON METROPOLITAN AIRPORTS AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a procurement award made by Metropolitan Washington Airports Authority to the second-best bidder in violation of the criteria set forth in the procurement was a violation of law.

2. Whether an entity required to follow federal procurement law must have or articulate any rational basis for making a procurement decision.

3. Whether in the absence of any proffer of a rational reason for contract award, the reviewing court may give deference to the agency action.

4. Whether entry of summary judgment was proper where there were substantial reasons to doubt the rationality of an agency contract award and awarding officers had clear conflicts of interest.

PARTIES

The parties to this case are those in the caption. In addition, Dulles Taxi Systems, Inc. was an intervenor below. Washington-Dulles Transportation, Ltd. is a privately held, company whose stock is not available for sale to the public or on any public market.

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Petitioner Washington-Dulles Transportation, Ltd. respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on January 30, 2004.

OPINIONS BELOW

The January 30, 2004 opinion of the Fourth Circuit Court of Appeals (unpublished) is set out at pp. 1a-16a of the Appendix to this petition. The May 28, 2002 memorandum opinion of the United States District Court for the Eastern District of Virginia (not officially reported) is set out at pp. 17a-27a of the Appendix. The previous August 29, 2001 opinion of the Fourth Circuit Court of Appeals, which is reported at 263 F.3d 371, is set out at pp. 28a-41a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on January 30, 2004, and the denial of a petition for reconsideration and rehearing en banc, which is set out at pp. 42a-43a of the Appendix, was entered February 24, 2004. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254§§.

STATUTES AND REGULATION INVOLVED

28 U.S.C. § 49101,with relevant portions set out in the Appendix to this Petition at pp. 44a-46a.

STATEMENT OF THE CASE

Petitioner Washington-Dulles Transportation, Ltd. ("WDT") was the incumbent contractor for taxicab services at Dulles International Airport near Washington, D.C. The taxicab concession at Dulles is awarded to a single company by the entity, which operates Dulles Airport, the Metropolitan Washington Airports Authority ("MWAA"). MWAA published a Request for Procurement, RFP-99-01, requesting bidders for the next three years, with an optional two-year extension. WDT

submitted a proposal and bid in full compliance with the RFP. The proposal was reviewed by the MWAA staff, and, exactly like every other proposal, was awarded points as directed by the RFP. WDT scored the highest number of points and was found to be the best qualified bidder according to the evaluation criteria of the RFP.

Following the evaluation of bids, the Board of Directors of MWAA held an executive meeting in secret session. At the meeting, they chose another bidder, Dulles Taxi Systems, Inc. ("DTS"). WDT was informed that it was entitled to a debriefing as to the reasons it was not chosen, but later was told that it could have no such briefing. MWAA declared that it had the sole and exclusive right to choose any bidder it wanted, and that it was not required to give a reason for its choice.

MWAA takes its existence from an interstate compact and an Act of Congress.[1] WDT filed an action in the United States District Court for the Eastern District of Virginia contending that MWAA failed to follow "full and open competition," 49 U.S.C. § 49104(a)(4)§§, and failed to comply with the provisions of its Lease. The District Court initially held that WDT lacked standing to bring the action, and that jurisdiction in the case was not proper in the federal courts. The District Court decided that it could look only at whether MWAA had *adopted* sound procurement regulations, not whether MWAA had *complied with* such regulations. The Fourth Circuit reversed and remanded, holding that according to the plain language of the Enabling Act, federal district courts "have

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[1] As fully set out in *Washington-Dulles Transportation, Limited v. Metropolitan Washington Airports Authority*, 263 F.3d 371 (4th Cir. 08/29/2001), *hereinafter WDT v. MWAA* and included at Pet. App. P. 28a-41a, the compact was between Virginia, Maryland, and the District of Columbia, and the Act of Congress was the Enabling Act, 49 U.S.C. §§ 49101 *et seq.* *See* Pet. App. pp. 30a-32a.

jurisdiction to compel [MWAA] and its employees to *comply with the terms of the lease."* 263 F.2d 371, 374, emphasis in original.

Following the remand, the parties undertook discovery. During discovery, MWAA took the position that none of its employees or officers or directors could testify about anything whatsoever which happened during so-called "executive sessions", and MWAA refused to provide any discovery regarding the reasons why it chose a bidder who was less qualified. For example, during the deposition of Mr. William Hazel, an MWAA director, the following exchange took place:

> Q [to Mr. Hazel]: Were you involved in a straw vote which resulted in a 5-4 decision to award the contract to WDT?
>
> OBJECTION [by MWAA counsel]: Again, renew my objection to the extent that that involves any discussion in an executive session and ask that Mr. Hazel not answer the question.

A similar objection and direction not to answer was made during the deposition of Mr. Keith Meurlin (another MWAA director):

> Q: And did you participate when the paper was presented to the Board?
>
> A: Yes. I was there.
>
> Q: And would you please tell us what happened at that time?
>
> OBJECTION: Objection. To the extent that calls for your participation in any executive sessions, I would direct the witness not to respond based on a continuing assertion of privilege with respect to such sessions. [p38]

WDT filed two motions to compel and both parties filed cross-motions for summary judgment. The motions to compel were denied and what happened during executive session shall forever remain secret. Nevertheless, MWAA was unable, at any time, to give or even to suggest any reason why it chose the second-best qualified vendor over the most qualified.

REASONS FOR GRANTING THE WRIT

Regularity, Reason and Rationality are Critical to Government Contracting and to Good Government

Regularity and the enforcement of government contracting principles foster competition, limit government spending, and prevent corruption. The unfettered power to make arbitrary awards from the public treasury does the opposite. One of the early acts of the Bush administration was to repeal a rule enacted at the end of the Clinton presidency, a rule which gave government contracting officers the ability to deny awards to contractors who had, in their view, exhibited "corporate irresponsibility." The notice of repeal, published in the April 3, 2001 Federal Register, correctly stated that the prior Clinton rule did not provide "contracting officers with sufficient guidelines to prevent arbitrary or otherwise abusive implementation", and the final repeal was published in 66 Federal Register No. 248, Dec. 27, 2001.

The Bush administration was right. Rules which give contracting officers and agencies free discretion and the use of fuzzy non-specific criteria invite arbitrary government action, foster favoritism, permit unfair discrimination, and ultimately result in corruption.

This is a case where a quasi-government agency acting in a closed "executive session" and in violation of its own contracting rules and RFP requirements declined to award a contract to a controversial Afghan immigrant who was also the

highest-qualified bidder. The awarding entity, MWAA, was given control of Dulles, Reagan National and Baltimore Washington airports by Congress, which directed that it must be limited in its contracting power by following established procurement regulations and sound contracting principles. These principles included fully competitive bidding. Nevertheless, a contract worth millions of dollars per year was awarded to a newly formed group of investors and new hires that included among its numbers a recent MWAA Board member used as a consultant in the group's dealings with MWAA. It was awarded with the participation of another Board member with a clear conflict of interest.[2] It was awarded in violation of the criteria in the RFP, in a closed "executive session." The award was nevertheless upheld by both the district court and the court of appeals by citing the requirement for courts to give deference to a supposed agency decision-making process.

WDT was founded and is largely owned and operated by Farouk Massoud, an Afgan immigrant to the United States. During the years in which his company held the Dulles taxicab concession, Mr. Massoud and WDT operated it without any significant complaints and, in fact, achieved several awards from MWAA for its assistance to MWAA and for its passenger service and reliability. When the taxicab contract was awarded to a company called Dulles Taxi Systems, Inc., Mr. Massoud asked to know why, and he was told that by the MWAA staff he was entitled to a debriefing. MWAA later determined that it would not give him a briefing and that it was under no obligation to explain to him, or to anyone, why it made the award.

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[2] One of the members of the Board, the strongest proponent of the winning bidder, was employed by the law firm that represented DTS before MWAA, and did not disclose this conflict at the time.

It was nothing less than astonishing to read the Fourth Circuit's contention that the reason for awarding the taxicab concession to the less qualified bidder was that the MWAA Board of Directors had considered WDT's "past performance" as a factor that the MWAA staff had neglected. It was more astonishing because the bidder to whom the award was made, DTS, had no past performance whatsoever. MWAA itself never claimed that the basis for its decision was "past performance"; instead it asserted repeatedly that it need give no basis other than its complete discretion.

In the open meeting of the Business Administration Committee on March 29, 2000, prior to Amendment No. 6, Board member Jeffrey Earl Thompson gave the clearest statement of what the problem with WDT might be, almost immediately after coming out of closed-session:

> "I echo the motion proposed by Bo [Director Robert Young] and seconded by Weldon in the perspective that the public perception of the operations at Dulles and the fact that who the operator is directly, indirectly represents a significant public service perspective of this Authority, and given all the discourse that has occurred, et cetera, et cetera, the problems that have been experienced, I think selection of number 2 is welcome." [sic]

There is no doubt that Mr. Farouk Massoud's company was the subject of some controversy (including a 1999 Washington Business Journal article calling him the "King of Dulles" and a Loudoun Times-Mirror article in 1999 with the subtitle "Ethnic divisions surface at Dulles Airport)." The taxicab drivers complained to the media about Mr. Farouk Massoud and about how hard a taskmaster he was to them. At one point he fired a significant number of drivers and sent tow-trucks to their homes to reclaim the cabs (which were WDT's

property). Prior to and during the procurement process, MWAA investigated driver complaints about Mr. Massoud, and the staff of MWAA determined that these complaints were, without exception, unfounded.

The "public perception of the operations at Dulles," to use Mr. Thompson's language, were not a proper consideration of the RFP process. This was confirmed at the same meeting by Mr. Edward S. Faggen, General Counsel of MWAA. Mr. Thompson then revised his remarks to say, "let's strike the word 'perception.' The facts are ... do more investigation of these articles..." [sic]

Director David Ralston, Chairman of the Board and a Washington, D.C. government contracts attorney, raised the same concern at the same meeting, pointing out that the Business Administration Committee had made a choice which was simply not supported by the RFP, and was not an evaluation criterion. After WDT notified MWAA that it was protesting the decision, the Board of MWAA issued the notorious "Amendment No. 6."

This "Amendment" stated that "past experience" had a "critical role" in the "ability of a proponent to develop and successfully implement Operating and Management Plans." It requested the bidders to answer five questions, but stated that the results would "not be used to re-score the previously submitted proposals" but instead would be "used as the Committee deems appropriate." The "Amendment" also stated that "[t]o the extent that this amendment is inconsistent with other provisions of the solicitation, this amendment shall control." To make the matter perfectly clear, the amendment changed the scoring and award mechanism so that "the relevant evaluation criteria set forth in the solicitation" would serve only as a guide to the Committee in "the required exercise of its discretion" to "recommend to the Board the proposal which, in

the Committee's sole judgment, best meets the overall requirements of the Authority..." In other words, a carefully designed evaluation and rationally based solicitation was, after the recipient was chosen and announced, replaced with a system where the whim of the Airport Authority's Board and Business Committee would be the only rule.

Both WDT and DTS provided answers to the Amendment No. 6 questions. The Business Administration Committee in fact noted that WDT provided extensive information,[3] but also commented, without explanation, that the material that WDT provided had reinforced its original decision. The Business Administration Committee later commented that it had exercised its discretion (a clear reference to the language of Amendment No. 6), using the RFP's evaluation criteria only as a guide, to discover that it had been right all along in choosing DTS over WDT. Never, at any time, did the Business Administration Committee or the Board of MWAA give a rational basis for its decision.[4]

Amendment No. 6 was nothing less than a cover-up by MWAA to justify its award to a company with connections to the MWAA Board of Directors. It was an after-the-fact attempt to pretend that the Authority was engaging in further fact-finding when, in truth, the Board had made its decision. It did, however, amend the solicitation document by removing the requirement for an objective evaluation, and it did after the award had been announced. The conclusion is inescapable that it did this solely to provide a legal basis for removing Mr. Massoud, an Afghan immigrant who had become the subject of attacks by some disaffected minority cabdrivers and who had

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[3] DTS was a startup company, so that most of the questions logically could have nothing to do with DTS operations at Dulles Airport.

[4] At oral argument in the Fourth Circuit, counsel for MWAA was again unable to provide the basis for the Committee's or the Board's choice.

been the subject of an unfavorable and unjustified media campaign.

During the period that this case was in litigation, the United States General Accounting Office (GAO) issued a report of MWAA's contracting practices.[5] The title of the report to Congress was "Metropolitan Washington Airports Authority Contracting Practices Do Not Always Comply with Airport Lease Requirements" (March 2002)." While the contracts audited by the GAO did not include concession contracts, it is clear that the criticism in the report applies equally to such contracts. In fact, "Recommendation 1 for executive action" is that MWAA's Board of Directors take steps to ensure that MWAA published "procedures for competitively awarding contracts in excess of $200,000 and ***all of its contracts for concession franchises*** and that MWAA publishes—and makes available to the public—a complete, accurate and current set of its contracting procedures." *Id.* at 37 (emphasis added). The GAO Report specifically mentions this case at page 34, footnote 37, pointing out that MWAA had misrepresented an earlier GAO report in various court proceedings, including this case, by affirming that GAO agreed that MWAA had complied with contracting requirements, when GAO had said that MWAA had not complied. GAO, in its report, concurred with the Fourth Circuit's direction in the first appeal in this case, *Washington-Dulles Transportation,*

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[5] The review was pursuant to the authority given GAO by the Enabling Act and was issued after an extensive review of MWAA procurement practices. The expertise of the GAO in this area has long been recognized by the courts, *M. Steinthal & Co. v. Seamans*, 147 U.S. App. D.C. 221, 455 F.2d 1289, 1305 (D.C. Cir. 1971), deriving from its long experience in settling contract-related public accounts and its practice of providing pre-expenditure advice regarding the legitimacy of contract awards. *See* A. GALLAGHER, THE LAW OF FEDERAL NEGOTIATED CONTRACT FORMATION 344-346 (1981).

Ltd. v. Metropolitan Washington Airports Authority, 263 F.3d 371 that MWAA use competitive procedures, not merely put them on paper. *Id.* at 376.

The GAO report states that, although the precepts of competitive public contracting owe much to the federal government's experience, the fundamental principles outlined are "not unique to federal contracting practice. The principles find expression, for example, in the American Bar Association's (ABA) PRINCIPLES OF COMPETITION IN PUBLIC PROCUREMENTS as well as in the ABA's MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS, adopted in 1979 and updated in 2000. Sixteen states, *including Virginia*, have adopted the model code". *Id.* at 48-49. Emphasis added. [JA:2359-2360]

The GAO concluded that, to achieve full and open competition, MWAA must change its way of operating so that prospective MWAA contractors are able to prepare and submit appropriate bids or proposals in response to an *identified* contract requirement. To help ensure that contract awards are not arbitrary or preferential and to protect the integrity of the competitive process, GAO stated that MWAA must write specific bidding procedures and, more importantly, follow them. *Id.* at 49. The award, in secret session, of a multi-million dollar contract to the less-qualified bidder, followed by the issuance of an ad hoc "Amendment No. 6" replacing the RFP's carefully drafted award criteria with a system of whimsy and unprincipled discretion does not meet the important objectives and requirements of the GAO Report and does not serve the public's interest in full and open competition in government contracting.

In an age where allegations of insider trading and self-dealing are becoming commonplace, and where public perception is that government contracts are awarded to

associates of the incumbent administration, it is critical for the standards of fair and open competition in government contracting to be clear. The courts are the ultimate enforcers of these standards. Nevertheless, both the district court and the court of appeals were apparently persuaded by the language in the RFP that MWAA had "sole judgment" and unfettered discretion to acquire the services otherwise than in the RFP when MWAA decided that it was in its interest to do so.[6]

This Court should take this opportunity to clarify that, in government contracts law, merely inserting into a procurement document such phrases as "sole judgment" and "unfettered discretion" does not relieve a public body of the requirement, imposed by Congress, to draft specific bidding procedures and regulations, and, as the GAO points out, follow them.

The Ruling of the Fourth Circuit is Contradictory to Rulings in the District of Columbia and the Federal Circuit.

As the Fourth Circuit noted[7], in a case where the plaintiff/bidder claims an agency action to be arbitrary, the "disappointed bidder bears the heavy burden of establishing in court that the decision by [a] government agency either had no rational basis or involved a clear and prejudicial violation of applicable statutes or regulations," and "WDT was required to 'demonstrate prejudice attributable to either (a) the procurement procedures were a violation of applicable statutes

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[6] Pet. App. p. 14a (court of appeal); Pet. App. p. 24a (district court). The district court's grant of summary judgment to MWAA was, however, based on a different theory—that WDT was disqualified from bidding. This issue was not raised in the pleadings and was not at issue in the case. It was not relied upon by the court of appeals.

[7] Pet. App. p. 12a, citing *Newport News Shipbuilding & Dry Dock Co. v. General Dynamics Corp.*, 960 F.2d, 386, 392. (4th Cir. 1992).

or regulations, or (2) an arbitrary or irrational decision of the procurement official on matters primarily committed to his discretion.'"[8]

Both were the case here. First DTS was chosen as a winning bidder in violation of the criteria set forth in the RFP and the procurement regulations of MWAA. Then, after the fact, the RFP was "amended" by Amendment No. 6 to justify the selection. Amendment No. 6 provided that MWAA's Business Administration Committee could choose, in its sole discretion and for any reason, any bidder it wanted. The wording of Amendment No. 6 permitted, and even mandated, an arbitrary decision process.

The Fourth Circuit suggested that the rational basis for MWAA's determination to pick the second-best bidder was the "past performance" of WDT. There is no support for that suggestion in the record of the case. Indeed, the RFP set out six evaluation criteria. These were: (1) operating plan; (2) management plan; (3) plan to achieve a minimum 10% participation by non-flyer taxicabs; (4) industry experience and qualifications; (5) financial offer and ability to perform; and (6) proposed disadvantaged business enterprise participation.

In none of these criteria, nor in their written descriptions in the RFP, does one find "past performance" of the vendor as any part of the evaluation criteria. One might argue that it could be included under industry experience and qualifications, but in that area, the MWAA staff's Business Administration Committee Report, dated March 2000, scored WDT with an "outstanding" evaluation, and added a note that WDT was "twice recognized by the Airport Ground Transportation Association as the number one airport taxi operator in the U.S. in management, operation, and customer service." Furthermore,

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[8] *Ibid.*

the Committee Reports from the Business Administration Committee did not identify this as the area in which "past performance" might be found.[9]

In permitting MWAA to adopt, after the award, a "past performance" standard for evaluating and comparing proposals, the Fourth Circuit has disregarded clearly established government contracting law, primarily developed by the District of Columbia and the Federal Circuit. Past performance standards, more properly called contractor responsibility standards, exist in government contracting, and they are made after proposal evaluation (as here) to determine whether a bidder has the capacity to do the work. Cf. 41 C.F.R. § 1-1.1203-1 (1983)§§; *Delta Data Systems v. William H. Webster*, D.C. Cir. Nos. 84-5356, 84-5362 (1984)[10]. However, they are not used as comparative evaluation criteria. There are, as the D.C. Circuit commented in *Delta Data Systems*, no gradations: the contractor is either responsible or non-responsible. If the contractor is not responsible, then the award may be made to the second most qualified, but there are procedural safeguards and appellate processes to contest the agency's determination by well-defined responsibility standards.

The test for reviewing courts is to determine whether "the contracting agency provided a coherent and reasonable explanation of its exercise of discretion," *Id.*, and the "disappointed bidder bears a 'heavy burden' of showing that

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[9] In the Business Committee meeting of March 29, 2000, the Board members themselves were unable to agree on a reason why DTS was chosen over WDT.

[10] *See also Air Terminal Services, Inc. v. Department of Transportation*, 400 F. Supp. 1029 (D.D.C. 1973), aff'd, 169 U.S. App. D.C. 297, 515 F.2d 1014 (D.C. Cir. 1975).

the award decision 'had no rational basis.'" *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 456 (D.C. Cir. 1994).

In awarding the contract, and in defending its decision if challenged, an agency is bound to follow the criteria set forth in an RFP. *Dynalantic Corp. v. U.S.*, No. 91-1162 (Fed. Cir. 09/10/1991); *Elcon Enterprises, Inc., v. Washington Metropolitan Airports Authority*, 977 F.2d 1472, 1481 (D.C. Cir. 1992). It has never, with the exception of the Fourth Circuit's decision, been sufficient to claim that the agency, by virtue of a late amendment to the RFP, had complete discretion to make any award it chooses. However, the Fourth Circuit has developed a line of cases to this effect.

Where, as here, an agency declines to provide reasons for its decisions other than to point to its own discretion, courts are not bound to give the agency deference in the decision making process. *See Home Box Office, Inc. v. FCC*, 185 U.S. App. D.C. 142, 567 F.2d 9 at 54-55 (D.C. Cir. 1977) (involving an ex parte contract)[11] This Court has held that meaningful judicial review may require that reasons for agency decisions, if they exist, must be given during litigation reviewing those decisions. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990); *Camp v. Pitts*, 411 U.S. 138, 142, 142-143 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

The rule established by the Federal Circuit and the District of Columbia Court of Appeals is that, after an unsuccessful bidder has made a threshold showing, such as demonstrating

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[11] "Where, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly, but must treat the agency's justifications as a fictional account of the actual decision making process and must perforce find its actions" *Ibid.*

that a lesser qualified bidder was chosen, then the court must require some explanation from the awarding agency. None was given in this case, and instead MWAA was permitted to hide its award-making process behind the secrecy of Executive Session privilege.[12] This is inconsistent with the laws regarding proper government contracting practices established by the District of Columbia Circuit and the Federal Circuit.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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[12] The parties had entered into a detailed protective order that protected any confidential information of MWAA. There was no realistic danger of disclosure of this information. *See, e.g., Henson v. Wyeth Laboratories, Inc.*, 118 F.R.D. 584 (W.D. Va. 1987).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 02-1656

WASHINGTON-DULLES TRANSPORTATION, LIMITED,

Plaintiff-Appellant,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

Defendant-Appellee,

DULLES TAXI SYSTEMS, INCORPORATED,

Intervenor/Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria
Claude M. Hilton, Chief District Judge;
Barry R. Poretz, Magistrate Judge;
Welton Curtis Sewell, Magistrate Judge
(CA-00-999-A)

Argued: October 28, 2003
Decided: January 30, 2004

Before MOTZ, TRAXLER, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

OPINION

PER CURIAM:

This appeal arises from an action brought by Washington-Dulles Transportation, Ltd. ("WDT"), which held the taxi concession contract for Washington-Dulles Airport, against the Metropolitan Washington Airports Authority ("MWAA"). In its action, WDT challenges MWAA's award of the airport's taxi concession contract to Dulles Taxi Systems, Inc. The district court granted summary judgment to MWAA and Dulles Taxi. We affirm.

I.

MWAA was created by the District of Columbia and Virginia for the purpose of operating the two federally-owned airports in the metropolitan area of the District of Columbia - Washington-Dulles International Airport and Ronald Reagan Washington National Airport. Transfer of the operating responsibility for the airports to MWAA was authorized by the Metropolitan Washington Airports Act of 1986 (the "Enabling Act" or "Act") via a 50-year lease (the "Lease") between the federal government and MWAA. *See* 49 U.S.C.A. §§ 49101 - 49112 (West Supp. 2003).

The Enabling Act prescribes a number of mandatory provisions that must be included in the Lease. Pertinent to this case, the Act requires the Lease to provide that "[i]n acquiring by contract supplies or services for an amount estimated to be more than $200,000, or awarding concession contracts, the Airports Authority to the maximum extent practicable shall obtain complete and open competition through the use of published competitive procedures." 49 U.S.C.A. § 49104(a)(4). The Act further requires that MWAA's contracts be "awarded by

procedures that follow sound Government contracting principles." *See* 49 U.S.C.A. § 49106(g). The Lease, in turn, contains provisions that comply with these legislative mandates.

To fulfill the requirement for published competitive procedures, MWAA adopted a contracting procedures manual. Pursuant to the manual, when a Request for Proposals is issued, the MWAA will evaluate each proposal and score it against predetermined evaluation criteria. MWAA will then select the proposal which offers the greatest overall benefit in terms of those criteria.

Pursuant to contracts awarded by MWAA, WDT was the exclusive taxicab concessionaire at Dulles International Airport from November 1, 1989 to July 31, 2000. In August 1999, in preparation for the expiration of the most recent contract, MWAA issued a Request for Proposals ("RFP") for the future operation of the Dulles taxicab concession. The contract to be awarded was for a period of three years, plus one two-year extension at MWAA's sole option. The RFP set forth six evaluation criteria, each with an accompanying explanation. The evaluation criteria were also assigned an "associated evaluation point value to provide proponents with a guideline of the relative importance of each element" to MWAA. J.A. 1158. The weighted evaluation criteria were as follows: (1) operating plan (30%); (2) management plan (15%); (3) plan to achieve a minimum 10% participation by the non-flyer taxicab fleet (15%); (4) industry experience and qualifications (15%); (5) financial offer, capital improvements, and financial ability to perform and pro forma statements (15%); and (6) proposed disadvantaged business enterprise participation (10%). However, the RFP also notified bidders, *inter alia,* of the following rights explicitly retained by MWAA:

1. The Authority will accept the proposal which, in the Authority's sole judgment, best meets the Authority's requirements as set forth herein. The Authority reserves the right to reject any or all proposals, to waive irregularities and technicalities in the proposals, to readvertise, or to proceed to provide the service otherwise when such actions are judged to be in the best interests of the Authority.

2. The Authority reserves the right to modify or amend any provision of the RFP document, including, without limitation, the provisions of the Contract.

. . . .

4. Proposals shall be rejected if the proponent . . . is in default or arrearage under any existing or previous agreement with the Authority, or if there exist any unpaid monetary claims by the Authority against the proponent. . . .

J.A. 1141.

Several companies, including WDT and Dulles Taxi, submitted bids for the new taxicab concession contract. The bids were first reviewed by a Technical Evaluation Committee comprised of MWAA staff members (the "staff"). The staff was provided a detailed listing of the six evaluation factors and subfactors taken from the RFP, and

an assigned total point value for each factor and subfactor.[1] Under the staff's evaluation, WDT scored the highest, with 843 points out of a maximum of 1000 points. Dulles Taxi scored the highest, with 771 points. In March 2000, the staff submitted a recommendation to MWAA's business administration committed ("the Committee"), which was compromised of members of the MWAA Board, that WDT receive the contract and remain as the taxi concessionaire.

The Committed subsequently met with WDT and Dulles Taxi and asked them to address more specifically their past experience and performance. During the meeting, several of the Committee members suggested that the staff's evaluation under the criteria had failed to account adequately for past experience and performance, and the Committee ultimately voted 3 to 1 to award the contract to Dulles Taxi even though the staff scored WDT higher.

Under MWAA procedures, however, the Committee did not have the final say on the award of the contract. The

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[1] For example, the "operating plan" criteria contained a listing of four subfactors with accompanying citation to the RFP. Subfactor 1A - "[t]he completeness, depth, quality, efficiency, reasonableness, and feasibility of the offeror's Taxicab Services/Operating Plan (pages 6 and 7 - RFP)" - was assigned the following point ranges:

135-150	Outstanding	Plan meets all and exceeds some or all requirements. . . .
134-120	Very Good	Plan meets all requirements. . . .
119-105	Good	Plan meets requirements . . . in most areas.
104-75	Fair/Poor	Plan meets requirements . . . in some areas.
74 and below	Unsatisfactory	Plan does not meet requirements in most areas.

J.A. 1329.

MWAA Board of Directors (the "Board") had to ratify or reject the Committee's recommendation. Consequently, on April 10, 2000, before the Board acted, WDT filed a pre-award protest of the Committee's selection of Dulles Taxi. WDT's chief assertion was that the Committee, in rejecting the staff's recommendation and choosing Dulles Taxi, had improperly ventured beyond the evaluation criteria.

After allowing both WDT and Dulles Taxi to submit written and oral comments regarding the issues raised in the protest, the Committee issued its April 28, 2000, report to the Board explaining its decision to select WDT and recommending that the Board affirm its choice. The report set forth the Committee's view that the staff's evaluation of the proposals had not adequately accounted for the past performance of the bidders, which was a consideration under several of the factors set forth in the selection criteria included in the RFP—the "operating plan," "management plan," and "industry experience and qualifications" criteria.

On May 1, 2000, WDT and Dulles Taxi submitted comments on the Committee's report to the Board and, two days later, were afforded the opportunity to present their arguments relating to the protest. The Board, however, delayed a decision pending the receipt of additional information from the parties pertaining to the protest issues and a reconsideration by the Committee of its decision. The Board also amended the RFP ("Amendment Six"), which clarified that the Committee and Board were not bound by the scores resulting from the staff's technical evaluation of the selection criteria, and requested that the bidders respond to five specific questions relating to past experience and performance issues. Ultimately, the Committee reaffirmed its earlier vote in favor of Dulles Taxi and recommended that the Board deny WDT's protest.

In a second report dated June 2, 2000, the Committee again outlined the reasons underlying its decision, pointing out in particular those areas where the Committee disagreed with the staff's assignment of points under the selection criteria. During the June 7, 2000, regular Board meeting, the Board affirmed the Committee's selection by a vote of 8 to 1.

WDT filed this action in federal court seeking a declaration that MWAA's decision violated the Enabling Act and the Lease, as well as an injunction barring MWAA from awarding the taxi concession to Dulles Taxi and directing MWAA to give the concession to WDT. WDT asserted that MWAA had deviated from its published competitive procedures in refusing to award the taxi concession contract to WDT and, therefore, had failed to obtain "complete and open competition," 49 U.S.C.A. § 49104(a)(4), or comply with "sound Government contracting principles," 49 U.S.C.A. § 49106(g), in violation of the Enabling Act and the Lease.

The district court initially dismissed WDT's complaint for want of subject matter jurisdiction, ruling that, although federal courts have jurisdiction to decide whether MWAA has adopted competitive bid procedures that satisfy the requirements of the Enabling Act, federal courts do not have jurisdiction when the application of the published competitive procedures are at issue. On appeal, we held that the Act specifically provided for the enforcement of the Lease in federal court, and that the Act allowed an aggrieved private party to bring an action to enforce the terms of the Lease. Accordingly, we reversed and remanded the matter for further proceedings before the district court. *See Washington-Dulles Transp., Ltd. v. Metropolitan Washington Airports Auth.*, 263 F.3d 371 (4th Cir. 2001).

On remand, WDT filed an Amended Complaint adding a claim for monetary damages. After completing discovery, WDT and MWAA/Dulles Taxi filed cross-motions for summary judgment on the merits. The district court granted summary judgment to MWAA and Dulles Taxi and denied WDT's motion for summary judgment. Applying a "rational basis" standard of review to MWAA's award of the contract to Dulles Taxi, the district court concluded that "the undisputed facts demonstrate that [MWAA] chose [Dulles Taxi] after a methodical review of the submitted proposals" and that WDT had failed to meet its burden of demonstrating that MWAA had no rational basis for awarding the contract to Dulles Taxi instead of WDT. J.A. 2658.

In the alternative, the district court ruled that WDT "was not in a position to bid on the RFP" in the first instance. J.A. 2659. During discovery, a new factual and legal question had developed. As noted above, the RFP provided that "[p]roposals shall be rejected if the proponent . . . is in default or arrearage under any existing or previous agreement with the Authority." J.A. 1141. The district court found that, at the time the contract was awarded to Dulles Taxi, WDT owed MWAA over $600,000 in payments under the old taxi concession contract and, therefore, WDT was disqualified from competing for the contract under the language of the RFP. The district court also ruled that WDT was not entitled to monetary damages under the Act or the Lease and rejected WDT's attempt to raise claims based on the tort of assumpsit and the Constitution.

On appeal, WDT asserts the district court erred in granting summary judgment to MWAA and Dulles Taxi, and against it, because (1) the undisputed facts reveal that the award was arbitrarily made to a less qualified bidder

without explanation, in violation of the Lease and Enabling Act; and (2) the court's conclusion that WDT was not a qualified bidder due to an alleged arrearage under the existing contract was not raised by MWAA in its pleadings and, in any event, was not supported by the record. In addition, WDT appeals the district court's denial of its motion to compel discovery into "executive sessions" held by the MWAA board members during the selection process, denial of its claim for monetary damages, and exclusion of its expert witnesses. For the reasons that follow, we affirm.

II. Motion to Compel

We first consider WDT's claim that the district court improperly denied its motion to compel written and oral discovery into matters which occurred during various "executive sessions" of the MWAA Board. The sessions at issue were conducted in a closed and private manner during the time the protest was under consideration. They were attended by in-house counsel and, in all but one instance, outside counsel as well. We review the district court's denial of a motion to compel for abuse of discretion. *See Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 929 (4th Cir. 1995).

On November 30, 2001, in response to written discovery requests, MWAA provided a detailed privilege log to WDT, listing all documents that it claimed were protected by the attorney-client privilege and work product doctrine. WDT's counsel made no effort to challenge those designations at the time, or to seek their production via a motion to compel. During subsequent depositions of various MWAA members, at least one of which took place in early January 2002, WDT's counsel asked broad questions about what occurred during the executive

sessions held by the MWAA Board. MWAA's attorneys objected to questions that sought to delve into discussions that took place during executive sessions of the Board, also claiming an attorney-client and work product privilege for such conversations.

On March 8, 2002, a week before the close of discovery and less than two weeks before the scheduled pre-trial conference, WDT filed a motion to compel discovery into the executive sessions. Specifically, WDT sought review of the documents for which the privileges had been asserted and an opportunity to redepose the MWAA witnesses on matters that occurred during executive sessions. On March 15, 2002, the magistrate judge conducted a hearing on the motion to compel. With regard to the executive session issue, the judge concluded that although some of what occurs in a closed executive session might be privileged, ordinary facts pertaining to business matters cannot be shielded merely by the presence of an attorney. The judge further set forth for WDT the appropriate course to take during the deposition of the CEO for MWAA which was scheduled for later that same day:

> Now, in regards to the deposition this afternoon, my guidance is, if there is a privilege asserted, that foundational questions may be asked to flesh out that privilege, and then you make a proffer on the privilege, you make a counter proffer, you certify the question, you come before the Court with the transcript, and then the Court has the benefit of everything, because once the foundational questions are asked, maybe it's a slam-dunker: obviously there is no privilege, because eighteen people were in the room who had no business being there at all. . . . [I]t seems to me that's the way to contour it out for the Court.

J.A. 719. At the conclusion of the hearing, the judge informed the parties that he would review *in camera* challenged documents for which a privilege was asserted and took the matter under advisement pending receipt of the challenged documents.

During the scheduled deposition of the CEO of MWAA, WDT's counsel chose not to follow the court's guidance. Counsel also rejected MWAA's offer to allow the CEO to testify regarding events that occurred during executive sessions, provided counsel agree that the testimony would not be construed as a waiver of the applicable attorney-client privilege and work-product protection.

On March 27, 2002, the magistrate judge, having conducted an *in camera* review of the sixty-five documents sought by WDT which were listed in MWAA's privilege log, denied the motion to compel. The judge concluded that the majority of the documents did not pertain to executive sessions at which the contract award was discussed or mentioned and, of the documents that did fall within those parameters, MWAA had properly asserted the attorney-client privilege. Shortly thereafter, WDT filed a "renewed" motion to compel with the district court. The district court denied the motion as well.

We find no abuse of discretion in the district court's resolution of WDT's motion to compel. After expressing concern over the lapse in time between MWAA's assertion of the privilege and the filing of a motion to compel, the magistrate judge clearly outlined for WDT the course to pursue during the upcoming deposition of the CEO of MWAA and considered *in camera* the challenged documents. Nonetheless, WDT chose not to follow the court's guidance and rejected MWAA's offer to allow questioning into the very matters into which WDT professed a need to inquire. Accordingly, we affirm the district court's denial of WDT's motion to compel.

III.

We next consider whether the district court improperly granted summary judgment to MWAA and Dulles Taxi and denied summary judgment to WDT on the merits. We review the district court's summary judgment rulings de novo. *See Figgie Int'l v. Destileria Serralles, Inc.*, 190 F.3d 252, 255 (4th Cir. 1999).

Generally, "a disappointed bidder bears the heavy burden of establishing in court that the decision by [a] government agency either had no rational basis or involved a clear and prejudicial violation of applicable statutes or regulations." *Newport News Shipbuilding & Dry Dock Co. v. General Dynamics Corp.*, 960 F.2d 386, 392 (4th Cir. 1992) (internal quotation marks omitted). Thus, WDT was required to "demonstrate prejudice attributable to either (1) the procurement procedure's violation of applicable statutes or regulations, or (2) an arbitrary or irrational decision of the procurement official on matters primarily committed to his discretion." *Id.*

WDT asserts that it established both that MWAA failed to obtain "complete and open competition," 49 U.S.C.A. § 49104(a)(4), and to comply with "sound Government contracting principles," 49 U.S.C.A. § 49106(g), as required by the Enabling Act and the Lease, and that MWAA's decision was arbitrary and irrational under the circumstances. Like the district court, we are unpersuaded.

The heart of WDT's claim is its complaint that the Board awarded Dulles Taxi the concession contract even though the staff evaluation team assigned WDT a higher score under the six published criteria than it assigned to Dulles Taxi. From this fact, WDT argues that the Committee and Board must have deviated from the published competitive procedures in awarding the contract, most likely in the closed executive

sessions. WDT contends that the decision to award the contract to Dulles Taxi was irrational because, under the staff evaluation, Dulles Taxi was a "less qualified" bidder. WDT's theory, however, suffers from a number of infirmities.

First, we may summarily dispense with WDT's wholly speculative assertion that the Board members must have employed undisclosed criteria in the selection process during closed executive sessions to reach their decision. There is simply no evidence in the record to support this assertion. No one disputes that the Board members were entitled to consult privately with legal counsel in executive session and MWAA acknowledged, in keeping with the magistrate judge's view, that not *every* communication taking place in executive session is automatically protected from disclosure. Thus, the magistrate judge advised WDT that it could delve into the question of whether the Board members discussed the actual award of the contract during the executive sessions. WDT, however, declined to do so. Accordingly, we have no information as to what occurred during the executive sessions and, as a result, no evidence that the Board members applied undisclosed or otherwise improper criteria as a basis for awarding the contract to Dulles Taxi during any such executive session. We do, however, have an abundance of information regarding the actions taken and opinions expressed by the Board members in public sessions and public documents - the Committee's original debate and vote to award Dulles Taxi the contract; the Board's decision to defer ruling on WDT's protest until more information could be gathered; the Committee's vote to reaffirm its original selection; two reports issued by the Committee explaining why it selected Dulles Taxi over WDT for the new contract instead of accepting the staff's evaluation and recommendation; and the Board's vote to affirm the Committee's ultimate decision.

Second, WDT's claim is founded upon the erroneous premise that the procurement process violated federal law and was otherwise irrational because, as a factual matter, the staff scored WDT 72 points higher than Dulles Taxi under the published criteria. The RFP issued August 1999 indicated that all proposals would be evaluated in accordance with the six published criteria, but application of the criteria necessarily required the exercise of independent discretion and judgment. The bidders were aware that neither the Board nor the Committee was bound by the numbers assigned by the staff evaluation team. And, in any event, the RFP plainly provided that MWAA would accept the bid which, "in [MWAA's] sole judgment . . . best meets [MWAA's] requirements" specified in the RFP and that it "reserve[d] the right to reject any or all proposals, to waive irregularities and technicalities in the proposals, to re-advertise, or to proceed to provide the service otherwise when such actions are judged to be in the best interests" of MWAA. J.A. 1141.

The members of the staff evaluation team were charged with scoring the proposals under the criteria, compiling their evaluations into a collective score, and submitting a *recommendation* to the Committee. WDT and Dulles Taxi scored first and second, respectively, but were separated by a narrow gap of only 72 out of 1000 points. Furthermore, the staff had no authority and was in no position to award the contract based upon these numbers. Rather, it was the Board members who retained the final decision-making authority. The Committee, which was free to view the proposals under the criteria as well and which allowed WDT and Dulles Taxi to make oral presentations, was obviously concerned about the staff's evaluation of several of the factors. Accordingly, the Committee chose to delve further into the issues of the bidders' procedure for handling complaints, and past experience and performance. Ultimately, the Committee concluded that the

staff's evaluation under the criteria had failed to adequately account for such matters. In response to WDT's pre-award protest and after considering yet additional argument and information from the bidders, the Committee again chose Dulles Taxi, reiterating its view that the staff's evaluation of the proposals had not adequately accounted for the past performance of the bidders, which was a consideration under at least two of the selection criteria included in the RFP. Accordingly, we see nothing improper in this course of events.

Finally, we are unpersuaded by WDT's reliance upon a 75-page report issued by the United States General Accounting Office ("GAO") concerning MWAA's contracting practices. Although the GAO report suggested that MWAA's practices did not always comply with the requirements of the Lease and recommended that MWAA's Board take steps to ensure that MWAA publish procedures for competitively awarding contracts in the future, the report provides no evidence that the selection process employed by MWAA in awarding this concession contract was not founded upon a full and open bidding process as required by the Enabling Act and Lease. The GAO report focused on contracts other than concession contracts and did not audit the taxi concession contract at issue. Moreover, the Enabling Act and Lease, rather than recommendations of the GAO, govern the action of MWAA.

In conclusion, the evidence presented by the parties reveals that the Committee and Board disagreed with the staff's application of several of the selection criteria and, in particular, believed that the staff failed to place enough emphasis on past performance issues. The bidders were given several opportunities to address the Board members' concerns and the Board ultimately chose the bidder that it believed best met the criteria and the needs of MWAA. Like the district court, we view MWAA's selection of Dulles Taxi over WDT as one grounded in a methodical and public

review of the proposals and one which rests upon a rational basis. Because WDT failed to establish that MWAA's procurement process violated the Enabling Act or Lease, or that the MWAA's decision to award the concession contract to Dulles Taxi instead of WDT was arbitrary or irrational, we affirm.[2]

IV.

For the foregoing reasons, we affirm the judgment of the district court.[3]

AFFIRMED.

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[2] Our conclusion on this point makes it unnecessary to consider MWAA's claim that the district court improperly granted summary judgment based on its conclusion that WDT was disqualified from bidding on the new concession contract because it was in arrears on its prior contract with MWAA.

[3] Because we affirm the district court's grant of summary judgment to MWAA, we express no opinion on WDT's claim that the magistrate judge improperly excluded expert testimony proffered by WDT and that the district court erred in concluding that WDT would not be entitled to monetary relief.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action 00-999-A

WASHINGTON-DULLES TRANSPORTATION, LTD.

Plaintiff

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

Defendant,

and

DULLES TAXI SYSTEMS, INC.

Intervenor-Defendant.

FILED MAY 28 2002

MEMORANDUM OPINION

This matter comes before the Court on the parties' cross motions for summary judgment. The Metropolitan Washington Airports Authority (hereinafter "the Authority") is an interstate compact created by the Commonwealth of Virginia and the District of Columbia to manage and operate Dulles International and Ronald Reagan Washington National Airports pursuant to a federal statute (hereinafter "the Transfer Act") and a fifty-year lease ("the Lease") between the Authority and the United States. *See generally* 49 U.S.C. §§ 49101 *et seq*. The

Authority is governed by a Board of Directors (hereinafter "the Board") which consists of thirteen members appointed, as per statute, by the Governor of the Commonwealth of Virginia, the Mayor of the District of Columbia, the Governor of the State of Maryland, and the President of the United States. *See* 49 U.S.C. § 49106(c).

From November 1, 1989 through July 31, 2000, Plaintiff was the exclusive taxicab concessionaire at Dulles International Airport based on several contracts awarded to it by the Authority. These contracts included a 1993 contract which initially ran from November 1, 1993 through October 31, 1998; an amendment extending the contract through October 31, 1999; and a series of amendments thereafter extending the contract through July 31, 2000.

The Authority issued a Request for Proposals RI-99-01 (hereinafter "the RFP") on August 25, 1999 seeking proposals from vendors interested in becoming the exclusive taxicab concessionaire for passengers arriving at Dulles International Airport beginning August 1, 2000. The RFP concession contract was for a period of three years, with an option of a two-year extension at the Authority's discretion. The RFP described the evaluation factors and subfactors, with specified relative weights of importance, which were to be considered by the Authority in choosing a concessionaire. Some factors weighed the vendors past performance and past experience. The RFP stated that the Authority would accept the proposal which, in the Authority's sole judgment, best met the Authority's requirements. The Authority reserved the right to reject any or all proposals, to waive irregularities and technicalities in the proposals, to re-advertise, or to proceed to provide the service otherwise when such actions are judged to be in the best interests of the Authority. The RFP also provided that proposals would be rejected if the proponent or any subcontractor was in default or arrearage under any existing or previous agreement with the Authority, or if there existed any

unpaid monetary claims by the Authority against the proponent or any of its participants or subcontractors.

The RFP required proposals to be submitted to the Authority on December 23, 1999, and on that date the Authority received several proposals including proposals from the Plaintiff and the Intervenor-Defendant. The Authority's staff thereafter evaluated the technical and financial merits of each proposal; conducted interviews with each proponent; requested and received a Best and Final Offer from each proponent and then scored each proponent. The staff scored the Plaintiff at 843 points out of 1,000 and scored the Intervenor-Defendant at 771 points out of 1,000. The Staff forwarded its recommendation to the Authority's Business Administration Committee (hereinafter "the Committee") which was comprised of members of the Authority's Board. After reviewing the Staff's recommendation, the Committee and other Board members invited the proponents to make presentations before them. During the presentations, the Committee asked the proponents specific questions relating to their past experience and performance, proposed approaches for performing on the contract, and current complaint resolution policy. On March 29, 2000 the Committee held a public hearing to debate the proposals, and by a vote of 3 to 1 the Committee selected the Intervenor-Defendant to become the exclusive taxicab concessionaire for Dulles International Airport.

On April 10, 2000, the Plaintiff filed a formal protest with the Board regarding the Committee's selection of the Intervenor-Defendant as the exclusive taxicab concessionaire, and alleged that the Committee's decision failed to fairly follow the evaluation criteria set forth in the RFP. On April 24, 2000, the Committee met and adopted procedures for handling the Plaintiff's protest. The Committee decided to provide the Plaintiff and the Intervenor-Defendant with a written report responding to the protest, delay the awarding of the contract to the Intervenor-Defendant and solicit comments from both parties. The

Committee also decided that the entire Board should consider the parties written submissions and presentations at the next Board meeting. After hearing the oral presentations of the parties and considering their written submissions, the Board elected to defer its decision on the Plaintiffs protest pending the receipt of additional information relating to the parties past experiences and performance. The Board set forth this additional information request in Amendment Six to the RFP. Amendment Six states that the information requested would not be used to re-score the previously submitted proposals, but would be used "as the Committee deems appropriate" and that the "relevant evaluation criteria set forth in the solicitation will serve as a guide to the Committee in the required exercise of its discretion." Amendment Six also stated: "In exercising its discretion, the Committee is to recommend to the Board the proposal which, in the Committee's sole judgment, best meets the overall requirements of the Authority to provide the best managed and operated taxicab concession for the Dulles Airport passengers and is otherwise in the best interest of the Authority." According to the procedures set forth in Amendment Six, the Committee would consider this additional information, make a recommendation to the Board and then the Board would then review the Committee's recommendation to determine whether it was reasonable, but would not conduct a *de novo* review of the record.

On May 25, 2000, after completing its protest review, the Committee by a vote of 2 to 1 reaffirmed its March 29, 2000 determination and awarded the concession contract to the Intervenor-Defendant. On June 7, 2000, the Board reviewed the Committee's recommendation and by a vote of 8 to 1 affirmed the Committee's decision. Shortly thereafter, the Plaintiff filed a complaint in this Court alleging that the Authority had violated the Transfer Act and the Lease, and breached its implied duty to consider the proposals fairly. The Authority moved to dismiss the Complaint for lack of subject matter jurisdiction and standing.

This Court granted the motion to dismiss finding that under the Transfer Act and the Lease, a federal court may entertain a facial challenge to the sufficiency of the published competitive procedures used by the Authority, but when the application of the published competitive procedures was at issue, as is the case here, there is no federal jurisdiction. On appeal, the United States Court of Appeals for the Fourth Circuit found jurisdiction and remanded the case to this Court for further proceedings.

Upon remand, the Plaintiff filed an Amended Complaint, alleging violations of the Lease (Count I) and certain portions of the Transfer Act (Counts II and III). The Amended Complaint also modifies the injunctive relief sought and adds a request for damages, including proposal and preparation costs; termination and re-establishment of operation costs; loss of business revenues and profits; material and equipment costs; loss of business reputation; protest costs; attorney's fees; and litigation costs. After engaging in a period of discovery, both the Plaintiff and the Authority now bring Motions for Summary Judgment.

The Plaintiff contends that the undisputed facts prove the Authority did not use published competitive procedures or follow sound government contracting principles because the Plaintiff received the highest score, offered the highest annual financial offer and capital improvement investment offer, but was not awarded the concession contract. The Plaintiff refers to a recent United States General Accounting Office (hereinafter "GAO") report in support of its position that the Authority did not fairly award the taxicab concession contract based on each proposal's merits. This report recommends that the Authority publish procedures for the awarding all concession franchise contracts; publish evaluating criteria in accordance with the factors and processes specified in its solicitation proposals; and update all procedures regularly. The Plaintiff continues by citing to the findings of the American Bar Association's Section on Public Contract Law which supports full and open disclosure of the

competitive factors be considered in the awarding of government contracts an implied duty for the government to fairly and honestly consider every proposal.

The Plaintiff seeks a remedy in equity which includes a right to injunctive relief and asks this Court to award the contract to the bidder who was the most qualified under the agency's procurement policies. *See Quality Transport Services. Inc. v. United States*, 12 Cl. Ct. 276, 282 (1987); *Essex Electronic Engineers, Inc. v. United States*, 3 Cl. Ct. 277, 287 (1983). The Plaintiff seeks damages and contends that the right to recover damages in government procurement cases is well established although sovereign immunity limits those damages to the cost of bid preparation. *See* 28 U.S.C. §1491(b). Lastly, the Plaintiff seeks damages for constitutional violations because it had a liberty interest in the right to be treated fairly during the bidding process and a First Amendment right not to be disparaged by unfounded and unfavorable news articles that weakened its chances for selection.

The Authority moves for summary judgment contending the undisputed facts show the Authority had the right to choose the proponent which in the Authority's sole judgment best met its requirements and the Authority did just that. The Authority contends that under Article 23 of the Lease and Section 49104(c) of the Transfer Act, monetary damages against the Authority are not allowed and the only remedy available is for the Court to compel the Authority to comply with the terms of the Lease. Even if money damages were allowed, the Authority notes that the Plaintiff has produced no evidence to prove damages "to a degree of certainty" as required under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 56. The Authority also moves for summary judgment based on Section (III)(D)(4) of the RFP which requires that a proponent "shall be rejected if the proponent . . . is in default or arrearage under any existing or previous agreement with the Authority," and it is undisputed that the Plaintiff is in

arrears with the Authority and therefore the Authority contends that it should have never considered the Plaintiffs proposal.

Summary judgment is appropriate where there is no genuine issue as to any material fact. *See* Fed. R. Civ. P. 56 (c). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 586-87 (1986). A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the nonmoving party. *See Id.* Mere speculation by the non-moving party "can not create a genuine issue of material fact." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985); *See Also Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986). Summary judgment is appropriate when, after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When a motion for summary judgment is made, the evidence presented must always be taken in the light most favorable to the non-moving party. *See Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996).

The facts are undisputed that the Authority's staff evaluated the technical and financial merits of each proposal it received, conducted interviews with each proponent and then scored the Plaintiff at 843 points out of 1,000 and scored the Intervenor-Defendant at 771 points out of 1,000. After reviewing the Staff's recommendation, the Committee and other Board members heard presentations from the proponents and held a public hearing. At those meetings, the Board questioned both the Plaintiff and the Intervenor-Defendant

about their past experience and performance in the taxicab business, proposed approaches for performing on the Authority's. contract, and current complaint resolution policies to gain a further understanding of who would be the best concession contractor. After the public hearing, the Board awarded the concession contract to the Intervenor-Defendant. Then the Plaintiff filed a protest of the Board's decision, and the Committee and the Board again reviewed the proponents' written submissions, entertained further oral presentations and reviewed additional material. After hearing the additional arguments and reviewing the additional materials, the Committee by a vote of 2 to 1 confirmed its March 29, 2000 decision and the Board by a vote of 8 to 1 affirmed the Committee's decision. It is clear that the Board followed the requirement of the RFP and gave a full and fair hearing to the Plaintiff and the other bidders.

When the decision maker has such a high level of discretion, federal courts have found that a disappointed bidder bears a "heavy burden " of showing that the award decision "had no rational basis." *Kentron Hawaii. Ltd. v. Warner*, 480 F.2d 1166, 1169 (D.C. Cir.1973); *See Also M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1301 (D.C.Cir.1971). The Plaintiff has not met that burden and the undisputed facts demonstrate that the Authority chose the Intervenor-Defendant after a methodical review of the submitted proposals. The language used in the RFP clearly states that it is in the Authority's sole judgment to select the proposal that best meets the Authority's requirements and the Authority did so after an evaluation of the technical and financial merits of each proposal received and after a second careful review when the Plaintiff filed its protest.

In any event, the Plaintiff was not in a position to bid on the RFP. The RFP states that a proponent "shall be rejected if the proponent . . . is in default or arrearage under any existing or previous agreement with the Authority" and that the Plaintiff

continues to be in arrearage on the 1998 Amendment extending the 1993 Contract. This language is clear and mandatory - once the Authority determines that a particular proponent is in default or arrearage under any agreement with the Authority, the Authority has no choice but to reject that proponent. The Authority learned during discovery that the Plaintiff failed to make the monthly minimum guarantee payments, percentage fee payments and profit sharing payments to the Authority as required. The Plaintiff owes the Authority over $600,000 and does not contest this fact, but rather contends that the Authority was not aware of any default or arrearage at the time of the Plaintiff's initial submission or Best and Final Offer, and therefore the Plaintiff should be allowed to proceed with this suit. Regardless of when the Authority discovered it was owed over $600,000 in back payments by the Plaintiff, the Plaintiff was and remains in default or arrearage under its previous agreement with the Authority and was in default or arrearage when it submitted its proposal and Best and Final Offer. The Plaintiff did not come forward with payment or information about the default or arrearage prior to submitting its bid. Therefore, according to the language in the RFP, the Plaintiff was and is disqualified from competing for the Dulles taxicab concession contract until it makes such payment.

The Plaintiff contends in this case that he is entitled to monetary damages. That where a contractor is unfairly denied the benefit of the implied contract between the public body and the contractor during a proposal evaluation, contract damages for breach are permitted under an Equal Access to Justice Act theory. *See* 5 U.S.C. § 504. This section allows for the recovery of costs and fees to a "prevailing party" when an agency conducts an adversary adjudication. However, 5 U.S.C. § 504 is not applicable here as Plaintiff is not a "prevailing party." There was no adversary adjudication, but rather a federal procurement where several bidders were ranked and one was selected. The Plaintiff also contends that the right to recover

damages in federal procurement cases is well established in 28 U.S.C. § 1491 (b) which allows courts to award any relief courts consider proper in federal procurement cases, including declaratory and injunctive relief, but monetary relief must be limited to bid preparation and proposal costs. The Plaintiff has not come forward with any evidence of damages as to the preparation and proposal costs.

Lastly, the Plaintiff raises for the first time in its summary judgment motion a claim based on the tort of assumpsit and two Constitutional violations. Procedurally, the Plaintiff may not raise new claims for the first time at the summary judgment. *See* Fed. R. Civ. P. 8(a). *See Also Hodges v. Koons Buick Pontiac GMC. Inc.* 180 F. Supp 2d 786, 793 (E.D. Va. 2001). Substantively, the Plaintiff fails to provide any evidence to support such allegations. To establish the tort of assumpsit, the Plaintiff must establish the existence of an express or implied contract, or facts and circumstances from which the law will raise an implication of a promise to pay. *See Raven Red Ash Coal Co.. Inc. v. Ball*, 39 S.E.2d 231, 234 (Va. 1946). The Plaintiff has failed to do so. With respect to its Constitutional arguments, the Plaintiff had no entitlement to the taxicab concession contract and therefore had no "property" or "liberty" interest at stake, and such claims lack merit. If the Plaintiff's Constitutional claims go to the process, the undisputed facts show the process to be fair and in accordance with the RFP and the Plaintiff has no evidence to the contrary.

Accordingly, summary judgment should be granted against the Plaintiff and for the Authority and Intervenor-Defendant.

An appropriate order shall issue.

Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
May 28, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action 00-999-A

WASHINGTON-DULLES TRANSPORTATION, LTD.

Plaintiff

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

Defendant,

and

DULLES TAXI SYSTEMS, INC.

Intervenor-Defendant.

FILED MAY 28 2002

ORDER

For the reasons stated in the accompanying memorandum opinion, it is hereby ORDERED that Plaintiff's motion for summary judgment is DENIED, and Defendant's motion for summary judgment is GRANTED; and this case is DISMISSED.

Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
May 28, 2002

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PUBLISHED

No. 00-2153

WASHINGTON-DULLES TRANSPORTATION, LIMITED,

Plaintiff-Appellant,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

Defendant-Appellee,

DULLES TAXI SYSTEMS, INCORPORATED,

Intervenor/Defendant-Appellee.

No. 01-1095

WASHINGTON-DULLES TRANSPORTATION, LIMITED,

Plaintiff-Appellant,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

Defendant-Appellee,

DULLES TAXI SYSTEMS, INCORPORATED,

Intervenor/Defendant-Appellee.

Appeals from the United States District Court for the
Eastern District of Virginia, at Alexandria
Claude M. Hilton, Chief District Judge.
(CA-00-999-A)

Argued: June 5, 2001
Decided: August 29, 2001

Before MOTZ, TRAXLER, and KING, Circuit Judges.

Reversed and remanded by published opinion.
Judge Traxler wrote the opinion,
in which Judge Motz and Judge King joined.

OPINION

TRAXLER, Circuit Judge:

The Metropolitan Washington Airports Authority (MWAA) is a regional entity created by the Virginia General Assembly and the District of Columbia City Council for the purpose of operating the federally owned Washington-Dulles International Airport and Ronald Reagan Washington National Airport. The Metropolitan Washington Airports Act of 1986, *see* Pub. L. 99-591,§§ 6001-6012, 100 Stat. 3341-376 (1986) (codified as amended at 49 U.S.C.A. § 49101 - 49112 (West Supp. 2000)) ("the Enabling Act"), authorized the transfer of the control and operation of these airports to MWAA via a 50-year lease (the "Lease") between the Secretary of Transportation and MWAA, *see* 49 U.S.C.A. §§ 49102(a), 49104.

In August 1999, MWAA issued a Request for Proposals for the Dulles taxicab concession contract. Appellant Washington-Dulles Transportation, Ltd. (WDT), the incumbent

taxi concessionaire, submitted a proposal but was not awarded the contract. MWAA's business administration committee instead selected Dulles Taxi Systems, Inc. to receive the taxi concession. WDT filed an action in federal court first seeking a declaration that MWAA's decision violated the Enabling Act and the Lease, and also seeking an injunction barring MWAA from awarding the taxi concession to Dulles Taxi and directing MWAA to give the concession to WDT. The district court subsequently dismissed WDT's complaint for want of subject matter jurisdiction. On appeal, we are asked to decide whether the district court had jurisdiction over this matter and, if so, whether WDT has standing to bring this action in the first place. We answer both questions in the affirmative. Accordingly, we reverse and remand for further proceedings.

I.

A.

Before Congress enacted legislation authorizing the Secretary of Transportation to transfer control of Dulles and Reagan National airports, the Commonwealth of Virginia and the District of Columbia, acting pursuant to an interstate compact, jointly created MWAA for the sole purpose of leasing Dulles and Reagan National airports from the federal government. *See* 1985 Va. Acts ch. 598, *repealed by* 2001 Va. Acts ch. 342 § 1 (to be codified at Va. Code Ann. § 5.1-153); D.C. Code Ann. § 7-1252. Virginia and the District of Columbia enacted similar statutes that conferred on MWAA various powers and assigned it various duties. *See* 2001 Va. Acts ch. 342 § 1 (to be codified at Va. Code Ann. § 5.1-156); D.C. Code Ann. § 7-1255. Under both statutory schemes, the courts of the Commonwealth of Virginia are vested with original jurisdiction "of all actions brought by or against [MWAA], which courts shall in all cases apply the law of the Commonwealth of Virginia." 2001 Va. Acts ch. 342 § 1 (to be

codified at Va. Code Ann. § 5.1-173(A)); *see* D.C. Code Ann. § 7- 1272(a). Virginia courts are given jurisdiction over lawsuits against MWAA for breach of contract, *see* 2001 Va. Acts ch. 342 § 1 (to be codified at Va. Code Ann. § 5.1-173(B)); D.C. Code Ann. § 7- 1272(b); however, neither the Virginia Code nor the D.C. Code specifically purports to give Virginia courts jurisdiction over actions against MWAA to force it to adhere to the terms of the Lease.

Thus, when Congress passed the Enabling Act, it did so with the knowledge that the state statutes creating MWAA broadly conferred jurisdiction to Virginia courts over legal actions involving MWAA. Recognizing a "continuing but limited" federal interest, 49 U.S.C.A. § 49101(3), in the operation of the two airports that "can be provided through a lease mechanism which provides for local control and operation," 49 U.S.C.A. § 49101(10), Congress dictated various requirements that the Lease must satisfy. Moreover, Congress granted the federal courts jurisdiction to enforce the provisions of the Lease: "The district courts of the United States have jurisdiction to compel the Airports Authority and its officers and employees to comply with the terms of the lease." 49 U.S.C.A. § 49104(c). The parties, however, dispute whether this action technically qualifies as one to compel MWAA to comply with the Lease under § 49104(c).

The Enabling Act prescribes a number of mandatory provisions that must be included in the Lease. *See* U.S.C.A. § 49104(a). The Lease, in turn, specifically incorporates these mandatory terms. The Enabling Act requires the Lease to provide that "[i]n acquiring by contract supplies or services for an amount estimated to be more than $200,000, or awarding concession contracts, the Airports Authority to the maximum extent practicable *shall obtain complete and open com petition through the use of published competitive procedures*." 49 U.S.C.A. § 49104(a)(4) (emphasis added). Section 11.D. of the

Lease more or less incorporates this provision, except that the Lease employs the phrase "full and open competition." J.A. 55. Congress determined that the Lease must also include a provision directing MWAA to "develop a code of ethics and financial disclosure to ensure the integrity of all decisions made by its board of directors and employees." 49 U.S.C.A. § 49104(a)(8). This provision is contained in section 14.C of the Lease.

The Lease also incorporates a number of the Enabling Act's other provisions even though these provisions are not statutorily required to be made part of the Lease. For example, the Enabling Act subjects MWAA's contracts to review to ensure the contracts "were awarded by procedures that follow sound Government contracting principles," *see* 49 U.S.C.A. § 49106(g), and the Lease provides for such a review as well. The Lease incorporates the Enabling Act's prohibition against board members and their immediate families working for or holding a "substantial financial interest" in any entity "that has or is seeking a contract or agreement with [the Authority]." 49 U.S.C.A. § 49106(d). The code of ethics that MWAA is directed to develop must include standards for determining what constitutes a "substantial financial interest" under § 49106(d). *See* 49 U.S.C.A. § 49104(a)(8). In addition to incorporating specific statutory requirements, the Lease also includes a catch-all requirement that MWAA "comply with the conditions imposed by the [Enabling] Act." J.A. 65.

MWAA adopted a "Contracting Policies and Procedures Manual" (the "contracting manual") expressly for the purpose of fulfilling "the legislative and lease requirements for published competitive procedures." J.A. 76. The contracting manual provides that when a Request for Proposals is issued, as in this case, the proposals "are evaluated and scored against predetermined evaluation criteria" and MWAA "select[s] the proposal which offers the greatest overall benefit to the

[MWAA] in terms of the evaluation criteria listed in the Request for Proposals." J.A. 83. WDT argues that its action for declaratory and injunctive relief is an attempt to compel MWAA to comply with these provisions of the Lease.

B.

WDT's complaint alleges that MWAA issued a formal Request for Proposals that disclosed the criteria MWAA would use in selecting the best proposal. An evaluation team reviewed the proposals and determined that WDT's proposal scored higher under these criteria than any other proposal and recommended that the concession be awarded to WDT. WDT's proposal, according to the complaint, was also the most "financially advantageous" proposal submitted to MWAA. Nevertheless, MWAA's business administration committee voted to reject the evaluation team's recommendation and to award the taxi concession to Dulles Taxi. Subsequently, one of the members of the business administration committee revealed that his law firm represented an entity that was partially owned by Dulles Taxi's principals and recused himself from further involvement in MWAA's request for proposals for the taxi concession. WDT formally protested MWAA's selection of Dulles Taxi. MWAA permitted WDT and Dulles Taxi to present additional information to the business administration committee, but the committee was not persuaded to change its recommendation that Dulles Taxi be awarded the taxi concession. Subsequently, MWAA's board of directors denied WDT's protest.

In its complaint, WDT contends that MWAA deviated from its published competitive procedures in refusing to award the taxi concession to WDT, which scored the highest on the selection criteria and received the recommendation of the evaluation team, and failed, therefore, to obtain "full and open competition," 49 U.S.C.A. § 49104(a)(4), or comply with

"sound Government contracting principles," 49 U.S.C.A. § 49104(g), in violation of the Enabling Act and the Lease. Additionally, WDT contends that the competitive nature of the procurement process was tainted by the business administration committee member's conflict of interest.

The district court ruled that it lacked jurisdiction. The court reasoned that federal courts have jurisdiction to decide whether MWAA has *adopted* competitive bid procedures that satisfy the mandate of the Enabling Act and that a federal court may entertain a facial challenge to the sufficiency of the "published competitive procedures" used by MWAA. However, the district court concluded that when the application of the published competitive procedures was at issue, there was no federal jurisdiction.[1]

II.

We first consider whether the district court had jurisdiction under § 49104(c). It is not clear to us why, under the language

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[1] Shortly after the district court entered its order of dismissal, WDT filed a similar action in Virginia state court. MWAA sought to dismiss that action as well, on the grounds that there is no cause of action under Virginia law permitting a disappointed bidder to challenge the decision of MWAA. The Virginia Circuit Court dismissed WDT's complaint, and the Supreme Court of Virginia denied review of that decision. WDT returned to district court and moved the court to vacate its order of dismissal under Rule 60(b)(1) of the Federal Rules of Civil Procedure because the district court's order, according to WDT, was based on the erroneous assumption that relief was available in the courts of Virginia. WDT also sought to have the order vacated under Rule 60(b)(3) because MWAA had taken inconsistent legal positions by arguing in federal court that Virginia courts would have jurisdiction but then moving to dismiss WDT's state action for lack of jurisdiction. The district court denied the motion. WDT appeals that decision as well as the original order of dismissal. We consolidated the separate appeals for purposes of review. In light of our disposition of the original order of dismissal, we need not address the district court's ruling on WDT's Rule 60(b) motion.

of the Enabling Act and the Lease, federal jurisdiction would be limited to ensuring only that MWAA has *adopted* competitive bid procedures that satisfy the requirements of the Enabling Act. Federal district courts "have jurisdiction to compel [MWAA] and its officers and employees *to comply with the terms of the lease*." 49 U.S.C.A. § 49104(c) (emphasis added). Nothing in this broad language suggests that federal jurisdiction over an action to enforce the terms of the Lease is circumscribed by anything other than the Lease itself. The Enabling Act is straightforward on this point – the district court has jurisdiction to entertain an action brought by a proper party to require MWAA to comply with any term contained in the Lease.

Thus, the question becomes whether WDT's complaint fairly alleges that MWAA failed to adhere to the terms of the Lease. We think the complaint clearly alleges that MWAA has failed to comply with the terms of the Lease. WDT contends that MWAA failed to "obtain complete and open competition through the use of published competitive procedures," 49 U.S.C.A. § 49104(a)(4), a mandatory term that is specifically incorporated into the Lease. According to WDT, MWAA ignored its published selection criteria in awarding the taxi concession and therefore failed to use its published competitive procedures. The Enabling Act and the Lease require MWAA to use published competitive procedures, not merely put them on paper. Federal jurisdiction over the enforcement of the Lease is consistent with the continuing federal interest in the airport. The federal government, as the lessor, has an obvious interest in the enforcement of the terms of a lease to which it is a party. Moreover, federal jurisdiction to enforce lease provisions involving procurement procedures is consistent with the structure of the relevant state statutes and the interplay between those statutes and the Enabling Act. Virginia law expressly exempts MWAA from the Virginia Public Procurement Act,

see 2001 Va. Acts ch. 342 § 1 (to be codified at Va. Stat. § 5.1-174), and the District of Columbia's statute likewise exempts MWAA from its procurement law, *see* D.C. Code Ann. § 7-1273. Unlike the Enabling Act, neither state statute addresses procurement procedures. And, although the state statutes provide a state court forum for general contract claims against MWAA, *see* 2001 Va. Acts ch. 342 § 1 (to be codified at Va. Code Ann. § 5.1-173(A), (B)); *see* D.C. Code Ann. § 7-1272(a), (b), these statutes do not specifically address actions to compel MWAA to adhere to its duties under the Lease. The Enabling Act, which was enacted after the state legislation, fills this gap, specifically providing for the enforcement of the terms of the Lease, including the provisions addressing the procurement of concession contracts, in federal court. Indeed, if the provision requiring full and open competition in competitive bidding is not enforceable in federal court, then this requirement in the Lease mandated by an Act of Congress would be a hollow and toothless promise.

Relying on *Metropolitan Washington Airports Auth. Prof'l Firefighters Local 3217 v. Metropolitan Washington Airports Auth.*, 159 F.3d 630 (D.C. Cir. 1998), MWAA argues that the jurisdiction of the district court does not extend to determining whether MWAA properly applied its published competitive procedures for awarding concession contracts. *Firefighters Local* considered the question of whether federal courts have jurisdiction to adjudicate an unfair labor practices claim brought by MWAA employees. *See id.* at 631. The Enabling Act requires the MWAA to continue the collective bargaining rights enjoyed by MWAA employees before the Lease became effective. *See id.* (citing 49 U.S.C.A. § 49104(a)(6)(D)). In view of this mandatory term, Article 14.B of the Lease requires MWAA to "'adopt and maintain an employment code.'" *Id.* MWAA therefore adopted, and Virginia ratified, a labor code that required unfair labor practices claims to be submitted to an

Unfair Labor Practices Panel. Under the labor code, Virginia Circuit Court is vested with jurisdiction to consider challenges to the panel's decision. *See id.* In *Firefighters Local*, the firemen's union filed an action in district court to enforce a decision of the panel that MWAA had violated the labor code by refusing to bargain in good faith. The District of Columbia Circuit held that the district court had no jurisdiction because the union's position was not that MWAA had violated the terms of the Lease, but that MWAA had violated the labor code. *See id.* at 633. The court distinguished the union's claim from one that "the Code on its face violated the lease in some manner," in which case "the federal district court would have had jurisdiction." *Id.* MWAA takes this to mean that when MWAA adopts policies or procedures pursuant to a directive from the Lease, federal district courts have jurisdiction only to the extent that an adopted policy or procedure, on its face, violates the Lease. Thus, according to MWAA, any matter involving the mere application or interpretation of the policy or procedure itself does not fall within the jurisdictional reach of the federal courts.

MWAA reads too much into *Firefighters Local*. Our case is different in this critical respect: We are presented with a claim that MWAA violated the terms of the Lease itself. In *Firefighters Local*, the court resolved a claim that MWAA had violated a provision of a state labor code, which had its own detailed enforcement mechanism. We do not face such an impediment to federal jurisdiction in this case. Thus, our determination that federal court is a proper forum for a Lease enforcement action under § 49104(c) is not inconsistent with *Firefighters Local*.

III.

MWAA argues that even if the federal courts have jurisdiction, WDT does not have standing to bring this action.

MWAA does not suggest that WDT lacks Article III standing or that prudential considerations preclude WDT from bringing suit. Rather, MWAA has framed this issue simply as one of statutory standing – whether Congress intended to confer standing on a litigant like WDT to bring an action under § 49104(c). Our task is essentially one of statutory construction. The provision at issue indicates that"[t]he Attorney General or an aggrieved party may bring an action *on behalf of the Government*" to compel MWAA to comply with the terms of the Lease. 49 U.S.C.A. § 49104(c) (emphasis added). MWAA concedes that WDT is "aggrieved" within the meaning of § 49104(c), but argues that WDT does not have standing to bring this action on its own behalf under § 49104(c) in view of the statutory command that such an action be brought "on behalf of the Government."

WDT, however, contends that the original language of the Enabling Act, as set forth in the Statutes at Large, differs significantly from the codified version of the Enabling Act and clearly permits WDT to bring this action: "An action may be brought on behalf of the United States by the Attorney General, or by any aggrieved party." 100 Stat. 3341-381. MWAA argues that the codification of the Enabling Act did not work a change in the meaning and, under either version, an aggrieved party must bring an action on behalf of the Government, if at all.

We disagree. We read the language of the original enactment to allow an "aggrieved" party to bring an enforcement action in its own right, and to permit the Attorney General to bring such an action *on behalf of* the Government. If Congress truly intended an aggrieved party to bring an action on behalf of the federal government, it is surprising there is no requirement that the aggrieved party seek the consent of the Government before proceeding, or, at the very least, inform the Government of its intent to proceed on behalf of the Government, as would a private relator in a qui tam action

under the False Claims Act. *See* 31 U.S.C.A. § 3730(b) (West Supp. 2001). Our reading of this provision, we note, is confirmed by the legislative history. *See* 131 Cong. Rec. S4879, S4887 (daily ed. April 26, 1985) (explaining, in a section-by-section analysis of the Enabling Act, that the "failure to observe [the mandatory] or other conditions of the lease would be the basis for the Attorney General (on behalf of the United States) or another aggrieved party to seek judicial enforcement of the lease."). Thus, we conclude that the Statutes at Large and the United States Code contain inconsistent provisions with respect to whether a private party, provided that it is "aggrieved," can bring an action on its own behalf against MWAA to enforce the Lease.

The statutory text contained in the United States Code is "prima facie" evidence of what the law is. *See* 1 U.S.C.A. § 204(a) (West 1997). The Statutes at Large, however, are "legal evidence" of the law. *See* 1 U.S.C.A. § 112 (West 1997). Accordingly, if there is a discrepancy between the two, the codified version of the law must yield to the Statutes at Large. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 448 (1993); *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964). By the same token, Congress has enacted some (slightly less than half) of the titles of the United States Code into positive law, in which case the text of the Code also becomes "legal evidence of the laws." 1 U.S.C.A. § 204(a).[2] Title 49 was enacted into positive

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[2] The Office of Revision Counsel submits to Congress the *United States Code*, one title at a time, for enactment into law. *See LaCrosse v. Commodity Futures Trading Comm'n*, 137 F.3d 925, 927 n.1 (7th Cir. 1998). When Congress enacts a title of the Code into "positive law," it puts its authoritative imprimatur on the language appearing in that particular title of the Code. *See generally* Norman J. Singer, *Sutherland Statutory Construction* § 36A:10 at 132 (6th ed. 2001) ("[T]he text of a code section in an enacted title can be taken as authoritative and need not be checked or

law prior to the passage of the Enabling Act, *see* Pub. L. 95-473, 92 Stat. 1337 (1978), and the Enabling Act was subsequently codified by congressional enactment and incorporated into Title 49, *see* Pub. L. 105-102, 111 Stat. 2204-2217 (1997).

Even if there is a conflict between the original Congressional enactment contained in the Statutes at Large and a codification that has been enacted into positive law, the Statutes at Large control when (1) the meaning of the original enactment was "clear and quite different from the meaning . . . ascribe[d] to the codified law," and (2) "the revisers expressly stated that changes in language resulting from the codification were to have no substantive effect." *Cass v. United States*, 417 U.S. 72, 82 (1974); *see Welden*, 377 U.S. at 98 n.4; *see also Finley v. United States*, 490 U.S. 545, 554 (1989) ("[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." (internal quotation marks omitted)). The Act that codifies the Enabling Act expressly disclaims the intent to make any substantive change in the law. *See* Pub. L. 105-102, § 4(a), 111 Stat. 2204, 2216. Because the codification of the Enabling Act resulted in a change that altered its substantive effect, we look to the Statutes at Large which, as we have explained, confer standing on WDT to bring this action on its own behalf.

IV.

For the foregoing reasons, we conclude that the district court has jurisdiction over the action brought by WDT. We further hold that, under the circumstances here, WDT has

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verified with the corresponding section in the original Statutes at Large, which must be done with respect to those titles which have not yet been enacted.").

standing to bring such an action. We express no opinion, however, on the underlying merits of WDT's claim that MWAA failed to comply with the provisions of the Lease. Accordingly, we remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1656
CA-00-999-A

WASHINGTON-DULLES TRANSPORTATION, LIMITED,

Plaintiff-Appellant

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

Defendant-Appellee

DULLES TAXI SYSTEMS, INCORPORATED,

Intervenor/Defendant-Appellee.

FILED
February 24, 2004

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Motz, Judge Traxler, and Judge King.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E

UNITED STATES CODE

TITLE 49 - TRANSPORTATION
SUBTITLE VII - AVIATION PROGRAMS
PART D - PUBLIC AIRPORTS
CHAPTER 491 - METROPOLITAN WASHINGTON AIRPORTS

* * * *

49 U.S.C. § 49101- Findings.

Congress finds that -

(1) the 2 federally owned airports in the metropolitan area of the District of Columbia constitute an important and growing part of the commerce, transportation, and economic patterns of Virginia, the District of Columbia, and the surrounding region;

* * * *

49 U.S.C. § 49104 - Lease of Metropolitan Washington Airports.

(a) General. - The lease between the Secretary of Transportation and the Metropolitan Washington Airports Authority under section 6005(a) of the Metropolitan Washington Airports Act of 1986 (Public Law 99-500; 100 Stat. 1783-375; Public Law 99-591; 100 Stat. 3341-378), for the Metropolitan Washington Airports must provide during its 50-year term at least the following:

> (1) The Airports Authority shall operate, maintain, protect, promote, and develop the Metropolitan Washington Airports as a unit and as primary airports serving the Metropolitan Washington area.

(2)(A)In this paragraph, "airport purposes" means a use of property interests (except a sale) for -

(i) aviation business or activities;

(ii) activities necessary or appropriate to serve passengers or cargo in air commerce; or

(iii) nonprofit, public use facilities that are not inconsistent with the needs of aviation.

(B) During the period of the lease, the real property constituting the Metropolitan Washington Airports shall be used only for airport purposes.

(C) If the Secretary decides that any part of the real property leased to the Airports Authority under this chapter is used for other than airport purposes, the Secretary shall -

(i) direct that the Airports Authority take appropriate measures to have that part of the property be used for airport purposes; and

(ii) retake possession of the property if the Airports Authority fails to have that part of the property be used for airport purposes within a reasonable period of time, as the Secretary decides.

(3) The Airports Authority is subject to section 47107(a)-(c) and (e) of this title and to the assurances and conditions required of grant recipients under the Airport and Airway Improvement Act of 1982 (Public Law 97-248; 96 Stat. 671) as in effect on June 7, 1987. Notwithstanding section 47107(b) of this title,

all revenues generated by the Metropolitan Washington Airports shall be expended for the capital and operating costs of the Metropolitan Washington Airports.

(4) In acquiring by contract supplies or services for an amount estimated to be more than $200,000, or awarding concession contracts, the Airports Authority to the maximum extent practicable shall obtain complete and open competition through the use of published competitive procedures. By a vote of 7 members, the Airports Authority may grant exceptions to the requirements of this paragraph.

* * * *

(2)

No. 03-1575

Supreme Court, U.S.
FILED
JUN 2 2 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WASHINGTON-DULLES TRANSPORTATION, LTD.,
Petitioner,

v.

WASHINGTON METROPOLITAN AIRPORTS AUTHORITY,
Respondent,

and

DULLES TAXI SYSTEMS, INC.
Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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OPPOSITION OF DULLES TAXI SYSTEMS, INC. TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Intervenor Dulles Taxi Systems states that it has no parent corporations and that there are no publicly held companies that own more than 10% of its stock.

IN THE

Supreme Court of the United States

No. 03-1575

WASHINGTON-DULLES TRANSPORTATION, LTD.,
Petitioner,

v.

WASHINGTON METROPOLITAN AIRPORTS AUTHORITY,
Respondent,

and

DULLES TAXI SYSTEMS, INC.
Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

OPPOSITION OF DULLES TAXI SYSTEMS, INC. TO PETITION FOR A WRIT OF CERTIORARI

Intervenor Dulles Taxi Systems, Inc. opposes Petitioner Washington-Dulles Transportation, Ltd.'s Petition for a Writ of Certiorari for the reasons stated in Respondent Washington Metropolitan Airports Authority's Brief in Opposition.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 2 2 2004
OFFICE OF THE CLERK

No. 03-1575

IN THE

Supreme Court of the United States

WASHINGTON-DULLES TRANSPORTATION, LIMITED,
Petitioner,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

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QUESTION PRESENTED

Based on the specific facts and circumstances set forth in the detailed record below, including a "methodical and public review" of proposals and two reports explaining the reasons for the selection decision made in accordance with the applicable contracting procedures, whether the Fourth Circuit erred in affirming the district court's grant of summary judgment and holding: (1) that Respondent Metropolitan Washington Airports Authority had a rational basis for selecting Dulles Taxi Systems, Inc. as the Dulles International Airport taxicab concession contractor and (2) that Petitioner failed to establish that Respondent's selection was arbitrary or irrational.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Metropolitan Washington Airports Authority states that it is an interstate compact, that it has no parent corporation and that there are no publicly held companies that own more than 10% of its stock.

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IN THE

Supreme Court of the United States

No. 03-1575

WASHINGTON-DULLES TRANSPORTATION, LIMITED,
Petitioner,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

COUNTERSTATEMENT

The Fourth Circuit held that Respondent's selection of Dulles Taxi Systems, Inc. as the Dulles International Airport taxicab concession contractor was: (1) "grounded in a methodical and public review;" (2) had "a rational basis;" and (3) was not "arbitrary or irrational". Pet. App. at 15a-16a. The Fourth Circuit's decision: (1) is based on specific facts and circumstances; (2) is not in conflict with the decision of another United States Court of Appeals; and (3) does not

involve broadly applicable principles of federal law. This case presents no issue worthy of review by this Court.

A. Respondent Metropolitan Washington Airports Authority Is An Interstate Compact, It Is Not A Federal Agency, And It Is Not Funded By Federal, State or Local Tax Dollars

Respondent Metropolitan Washington Airports Authority ("Authority") is an interstate compact created by the Commonwealth of Virginia and the District of Columbia for the purpose of operating two federally owned airports in the metropolitan area of the District of Columbia–Reagan National Airport and Dulles International Airport ("Dulles"). Transfer of the two airports to the Authority was authorized by the Metropolitan Washington Airports Act of 1986 ("Enabling Act" or "Transfer Act") via a 50-year Lease. *See* 49 U.S.C.A. §§ 49101–49112 (West 2004); Va. Code Ann. §§ 5.1-152–5.1-177 (Michie 2003); D.C. Code §§ 9-901–9-926 (West 2003); Pet. App. at 2a, 17a.[1]

The Authority is not a federal agency and is not funded by federal, state or local tax dollars. *See* 49 U.S.C.A. §§ 49102(a), 49106(a)(2), 49106(b), 49111(b); Va. Code Ann. §§ 5.1-156, 161, 168; D.C. Code §§ 9-905, 910, 917. *See generally* Pet. App. at 17a, 29a. The Authority is governed by its Board of Directors ("Board"), which consists of 13 members appointed by the Governors of Maryland and Virginia, the Mayor of the District of Columbia, and the President of the United States. *See* 49 U.S.C.A. § 49106(c); Pet. App. at 18a.

The Transfer Act includes certain provisions specifying how the Authority is to conduct its contracting. *See, e.g.*, 49 U.S.C.A. § 49104(a)(4) (the Authority "to the maximum

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[1] Contrary to the assertion in the Petition at 5, the Authority does *not* operate a third airport, Baltimore-Washington International Airport.

extent practicable shall obtain complete and open competition through the use of published competitive procedures;" however, by a vote of 7 members of the Board the Authority may grant exceptions to this requirement). Pursuant to these provisions, the Authority has adopted its own contracting procedures manual and issues additional contract-specific procedures in each Request For Proposals ("RFP"). Pet. App. at 3a.

B. The Existing Dulles Taxicab Concession Contract

Petitioner was the incumbent Dulles taxicab concession contractor. Under its existing contract with the Authority, Petitioner was required, *inter alia*, to calculate the amount of certain payments, to submit certain financial reports, and to make three different types of payments to the Authority. Pet. App. at 3a, 18a, 25a.

C. The RFP For The New Dulles Taxicab Concession Contract

On August 25, 1999, the Authority issued an RFP for the future operation of the Dulles taxicab concession. Pet. App. at 3a, 18a. The RFP sets forth a two-part evaluation process: (1) a recommendation made by the staff based on the specific evaluation criteria set forth in the RFP and (2) a decision made by the Authority, acting through a Business Administration Committee ("Committee") composed of some members of the Board, and the full Board, based on an exercise of the discretion explicitly granted to the Authority in the RFP. Pet. App. at 3a-6a, 14a-15a, 18a-19a.

With respect to the first part of the evaluation process, the RFP contains six evaluation factors. Pet. App. at 3a. Factors 1, 2, and 4 contain subfactors relating to past experience and performance. Pet. App. at 6a.

With respect to the second part of the evaluation process, the RFP states:

> The Authority will accept the proposal which, *in the Authority's sole judgment*, best meets the Authority's requirements as set forth herein. The Authority reserves the right to reject any or all proposals, to waive irregularities and technicalities in the proposals, to re-advertise, or to proceed to provide the service otherwise when such actions are judged to be *in the best interests of the Authority*.

Pet. App. at 4a (emphasis added).

The RFP, however, precludes the Authority from accepting a proposal if the proponent "is in default or arrearage under any existing or previous agreement with the Authority . . . ." *Id.*

D. The Authority Used A "Methodical And Public" Process To Select The Dulles Taxicab Concession Contractor

A number of proponents, including Petitioner and Dulles Taxi Systems, Inc. ("DTS"), submitted proposals in response to the RFP. The Authority's staff evaluated Petitioner and DTS as the two highest rated proponents, with 843 points and 771 points respectively, of a maximum of 1000 points, and forwarded a draft recommendation paper to the Committee. Pet. App. at 4a-5a, 19a.

In March 2000, proponents, including Petitioner and DTS, were invited to make, and did make, formal presentations to the Committee. During their respective presentations, Committee members asked Petitioner and DTS specific questions relating to various issues including past experience and performance. Pet. App. at 5a, 19a. At a subsequent public meeting held on March 29, 2000, the Committee, following a public debate, voted 3 to 1 to select DTS for the Dulles taxicab concession. *Id.*

Pursuant to the Authority's applicable procedures, Petitioner submitted to the Authority a written pre-award protest of the Committee's selection. In response, in accordance with applicable procedures, the Authority: (1) did not go forward with a contract award to DTS; (2) provided Petitioner and DTS with a written report responding to the protest ("April 2000 Report"); and (3) solicited written comments from Petitioner and DTS regarding the April 2000 Report. Pet. App. 6a, 19a.

The April 2000 Report is significant. First, as the Fourth Circuit noted: "The report set forth the Committee's view that the staff's evaluation of the proposals had not adequately accounted for the past performance of the bidders, which was a consideration under several of the factors set forth in the selection criteria included in the RFP—the 'operation plan,' 'management plan,' and 'industry experience and qualifications' criteria." Pet. App. at 6a. Second, the April 2000 Report explicitly debunks Petitioner's unsupported and unsupportable conflict of interest allegations relating to certain Board members. *See, e.g.*, Pet. at 5. As the Fourth Circuit concluded, relying in part on the April 2000 Report: "There is simply no evidence in the record to support this assertion." Pet. App. at 13a. Third, the existence of the April 2000 Report, and the subsequent due process provided by the Authority, contradicts the fundamental premise of the Petition—that Petitioner was not given the reasons for the Authority's decision. *See, e.g.*, Pet. at 5-8, 15.

At the Board's May 3, 2000 meeting, after considering written submissions provided by the Committee, Petitioner, and DTS, and oral presentations made by Petitioner and DTS, the Board elected to defer its decision on Petitioner's protest pending: (1) receipt of additional information from Petitioner and DTS relating to past experience and performance and (2) consideration of this additional information by the Committee. Pet. App. at 6a, 20a.

On May 5, 2000, the Authority issued RFP Amendment 6, which sought additional information from Petitioner and DTS, including responses to five specific questions relating to past experience and performance. Pet. App. at 6a. Amendment 6 also states: (1) the information requested "would not be used to re-score the previously submitted proposals"; (2) the additional information would be used by the Committee "as the Committee deems appropriate"; (3) the "relevant evaluation criteria set forth in the solicitation will serve as a guide to the Committee in the required exercise of its discretion"; and (4) "[i]n exercising its discretion, the Committee is to recommend to the Board the proposal which, in the Committee's sole judgment, best meets the overall requirements of the Authority to provide the best managed and operated taxicab concession for the Dulles Airport passengers or is otherwise in the best interest of the Authority." Pet. App. 20a.

Although explicitly entitled to do so under the applicable procedures, Petitioner did not protest or otherwise object to any of the terms of Amendment 6. Indeed, Petitioner's response to Amendment 6 included the following affirmative statement concerning its financial past performance: Petitioner "is current and has fully paid all of its financial obligations to [the Authority] without any institution of suit or demand." Fourth Cir. Joint App. at 1727.

On May 25, 2000, after reviewing the additional material provided by Petitioner and DTS in response to Amendment 6, the Committee, by a 2 to 1 vote, reaffirmed its selection of DTS and recommended that the Board deny Petitioner's protest. Pet. App. at 6a, 20a. On June 2, 2000, the Committee provided the Board with a second report explaining the basis for its determination ("June 2000 Report"). As the Fourth Circuit noted, the June 2000 Report "again outlined the reasons underlying [the Committee's] decision, pointing out in particular those areas where the Committee disagreed with

the staff's assignment of points under the selection criteria." Pet. App. at 7a. On June 7, 2000, the Authority's Board met in public session, discussed Petitioner's protest, and denied the protest by an 8 to 1 vote. Pet. App. 7a, 20a.

E. The Proceedings Below

On June 16, 2000, Petitioner filed its initial Complaint in district court. On June 29, 2000, the Authority filed a motion to dismiss for lack of subject matter jurisdiction and standing. Pet. App. at 7a, 20a. On July 19, 2000, the district court granted the Authority's motion to dismiss. On August 1, 2000, DTS began performance of the Dulles taxicab concession contract and is currently performing the contract. On August 29, 2001, the Fourth Circuit reversed the district court's decision and remanded the case to the district court for further proceedings, explicitly stating that in so doing it was expressing "no opinion . . . on the underlying merits of [Petitioner's] claim . . . ." *Washington-Dulles Transp., Ltd. v. Metropolitan Washington Airports Auth.*, 263 F.3d 371, 379 (4th Cir. 2001); Pet. App. at 29a, 41a.

On remand, in response to the Authority's discovery requests, Petitioner produced a statement prepared by Petitioner's outside accounting firm disclosing, for the first time, that Petitioner owed the Authority hundreds of thousands of dollars under the prior contract. In depositions, Petitioner admitted that it owed and had not paid the Authority certain payments under the prior contract. *See* Pet. App. at 25a.

During discovery, Petitioner requested from the Authority information relating to executive sessions of the Authority's Board. In response, the Authority consistently maintained that to the extent Board members and Authority senior management consulted with counsel during executive sessions, these discussions, and the documents prepared by counsel relating to them, were protected under the attorney-

client privilege and/or work product doctrine. The Authority provided Petitioner with a privilege log listing by document its assertions of the attorney-client privilege and the work product doctrine. During subsequent depositions taken by Petitioner, the Authority raised equivalent objections based on the attorney-client privilege and the work product doctrine. Pet. App. at 9a-10a.

A week before the close of discovery, and less than two weeks before the pre-trial conference, Petitioner filed a motion to compel discovery about the Authority's executive sessions. During oral argument on Petitioner's motion, the magistrate judge gave Petitioner instructions on how to frame an objection to a claim of privilege. Petitioner did not follow that guidance. Pet. App. at 10a-11a.

At a subsequent deposition of the Authority's CEO, James Wilding, the Authority offered to permit Mr. Wilding to testify about what had occurred at an executive session, provided that his testimony would not be construed as a waiver of the attorney-client privilege and work product doctrine protections. Petitioner rejected the Authority's offer. Pet. App. at 11a.

The magistrate judge, after in camera review of documents from the Authority's privilege log, denied Petitioner's motion. Petitioner filed a "renewed" motion to compel with the district court. The district court denied Petitioner's motion. Petitioner appealed. Pet. App. 9a-11a. The Fourth Circuit affirmed the district court, noting that Petitioner "chose not to follow the court's guidance and rejected [the Authority's] offer to allow questioning into the very matters into which [Petitioner] professed a need to inquire." Pet. App. at 11a.

On April 18, 2002, the parties filed cross-motions for summary judgment. On May 28, 2002, the district court: (1) granted the summary judgment motion filed jointly by the

Authority and intervenor DTS; (2) denied Petitioner's summary judgment motion; and (3) dismissed the case. Pet. App. at 17a. The district court held that the Authority's decision was based on a "methodical review of the submitted proposals" and that Petitioner had failed to demonstrate that the decision "had no rational basis." Pet. App. at 24a. In the alternative, the district court held that Petitioner was "not in a position to bid on the RFP" because Petitioner

> was and remains in default or arrearage under its previous agreement with the Authority and was in default or arrearage when it submitted its proposal and Best and Final Offer. [Petitioner] did not come forward with payment or information about the default or arrearage prior to submitting its bid. Therefore, according to the language in the RFP, [Petitioner] was and is disqualified from competing for the contract . . . .

Pet. App. at 24a-25a. Petitioner appealed the district court's decision.

On July 26, 2002, in accordance with the statutes creating the Authority, the Authority filed an action against Petitioner in the Circuit Court of Fairfax County alleging that Petitioner was in default and arrears under the prior contract. *See* Va. Code Ann. § 5.1-173 ("[C]ourts of the Commonwealth of Virginia shall have original jurisdiction of all [contract] actions brought by . . . the Authority"); D.C. Code § 9-922 (same). On October 31, 2003, the Circuit Court entered Judgment in favor of the Authority and awarded the Authority the sum of $1,132,103.73, plus attorneys fees, expenses, and statutory costs. *See* Final Judgment Order, *Metropolitan Washington Airports Auth. v. Washington-Dulles Transp., Ltd.*, Law No. 206086 (Va. Cir. Ct. Ffx. Cty., Oct. 31, 2003), Resp. App. at 1a-3a.

On January 30, 2004, the Fourth Circuit affirmed the district court's decision, finding that the record contained "an abundance of information" about why the Authority made its

selection, including "two reports issued by the Committee explaining why it selected [DTS] over [Petitioner] for the new contract instead of accepting the staff's evaluation and recommendation." Pet. App. at 13a. The Fourth Circuit held that the Authority's decision was consistent with the published competitive procedures contained in the RFP, was "grounded in a methodical and public review of the proposals," had "a rational basis," and was not "arbitrary or irrational." Pet. App. at 14a-16a. Based on this conclusion, the Fourth Circuit determined that it was "unnecessary to consider" the alternative basis for sustaining the Authority's summary judgment motion–that Petitioner was disqualified from bidding because it was in arrears under its prior contract with the Authority. Pet. App. at 16a n. 2.

REASONS FOR DENYING THE PETITION

This case presents no question worthy of this Court's review.

I. THE FOURTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS

The Fourth Circuit's decision is not in conflict with the decision of any other United States Court of Appeals. No other Court of Appeals has issued a decision that has reviewed the Authority's selection of a contractor made pursuant to the specific contracting procedures applicable to a competition conducted by the Authority. In particular, no other Court of Appeals has reviewed the Authority's selection of a contractor under an Authority RFP, such as the one in this case, that contains a clearly disclosed two-step evaluation process: (1) a recommendation made by the staff based on detailed evaluation criteria set forth in the RFP and (2) a decision made by the Authority based on an exercise of

discretion explicitly granted to the Authority in the RFP. *See* Pet. App. at 3a-7a, 14a-15a.

A. The Fourth Circuit's Decision Regarding The Authority's Use Of Past Performance As An Evaluation Factor Is Not In Conflict With The Decision Of Any Other United States Court Of Appeals

Petitioner's alleged "conflict" regarding the use of "past performance" as an evaluation factor is devoid of merit. Pet. at 12-13. First, the factual premise for Petitioner's argument—that past performance was not an evaluation factor, that prior to the Fourth Circuit's decision Petitioner was not aware of the Authority's concerns relating to past performance, and that the Fourth Circuit, after the fact, had "suggested" that the Authority's selection was based on past performance—is blatantly contrary to the record. Pet. at 6, 12. The RFP disclosed that past performance would be considered under several evaluation factors. Pet. App. at 6a, 15a, 18a. In addition, the Authority, after the submission of initial proposals and prior to contract award, sought additional information regarding Petitioner's past performance and informed Petitioner that it was evaluating past performance. These requests for information and disclosures by the Authority occurred in hearings, written requests, and an amendment to the RFP. Pet. App. at 5a-7a. It is obvious that Petitioner understood these requests and disclosures—Petitioner, in response, provided information to the Authority relating to its past performance. Pet. App. at 5a-6a, 14a-15a. The Authority also explained its concerns relating to Petitioner's past performance in two written Reports. *See* Pet. App. at 6a-7a, 14a-15a. Thus, there is no factual basis for Petitioner's allegation.

Second, Petitioner misstates and misapplies federal procurement law regarding the use of past performance as an evaluation factor. Pet. at 13. Petitioner asserts that past

performance is not properly part of an evaluation, but rather part of a post-evaluation responsibility determination. As a matter of federal government contracts law, Petitioner is wrong. The Federal Acquisition Regulation ("FAR") requires agencies, with limited exceptions, to include past performance as a factor in the evaluation process. 48 C.F.R. § 15.304(c)(3). *See generally Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 203 (D.C. Cir. 1984) (Scalia, J.) (prior to requirement in FAR, proper to consider financial past performance in evaluation process). That is what the Authority did. Thus, there is no conflict.

But, even if the Petitioner were correct concerning how past performance must be used by federal agencies in federal procurements, which it is not, there is no conflict. The Authority is not a federal agency, this case does not involve a federal procurement, and the FAR does not apply. The FAR applies to the acquisition "by contract with appropriated funds of supplies or services . . . by or for the use of the Federal Government through purchase or lease," 48 C.F.R. §§ 1.104, 2.101 (definition of "Acquisition"). This case does not involve the acquisition of supplies or services using appropriated funds by or for the use of the Federal Government. This case involves an Authority concession contract under which the contractor pays the Authority for the right to operate a taxicab concession. Federal agency procurement law does not apply. Pet. App. at 17a-18a, 49 U.S.C.A. §§ 49102(a), 49106(a)(2), 49111(b); GAO Report 02-36 at 2 (March 1, 2002) ("Authority is not required to follow federal procurement statutes and regulations"). *See* Pet. App. at 15a. Petitioner's alleged conflict is simply nonexistent.

B. The Fourth Circuit's Decision Is Based On A *De Novo* Review Of The Record, Does Not Defer To The Authority, And Is Not In Conflict With The Decision Of Any Other Court Of Appeals

Petitioner alleges that the Fourth Circuit's decision is in conflict with the decisions of other Courts of Appeals because it gives deference to an "agency" when an agency declines to provide reasons for its decision. Pet. at 14-15. Petitioner's allegation is clearly contrary to the record. The Fourth Circuit did not defer to the Authority. The Fourth Circuit conducted a de novo review of the record. Pet. App. at 12a. The Fourth Circuit found that the Authority, which is not an agency, had provided a detailed explanation of the reasons for its decision. Pet. App. at 6a-7a. *See* 49 U.S.C.A. § 49106(a). Indeed, the Fourth Circuit noted that the record contains "an abundance of information" regarding the reasons for the Authority's actions including "two reports . . . explaining why it selected [DTS] over [Petitioner] . . . ." Pet. App. at 13a. Based on this extensive review of the record–not deference–the Fourth Circuit concluded that the Authority's decision: (1) was "grounded in a methodical and public review of the proposals;" (2) was based on "a rational basis;" and (3) was not "arbitrary or irrational." Pet. App. at 15a-16a. Petitioner's alleged conflict is pure fiction.

II. THIS CASE DOES NOT PRESENT AN IMPORTANT, BROADLY APPLICABLE, QUESTION OF FEDERAL LAW THAT SHOULD BE ADDRESSED BY THIS COURT

This case is fact specific and involves a statutory scheme applicable to only one interstate compact, the Authority. *See* 49 U.S.C.A. §§ 49101-49112; Va. Code Ann. §§ 5.1-152–5.1-177; D.C. Code §§ 9-901–9-926. This case does not

present an important, broadly applicable, question of federal law that should be addressed by this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 206086

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,
Plaintiff,

v.

WASHINGTON-DULLES TRANSPORTATION, LTD.,
Defendant.

FINAL JUDGMENT ORDER

THIS MATTER came before the court for trial on October 20 through October 22, 2003, without a jury, upon the claims of the plaintiff, the affirmative defenses of the defendant having been stricken by Order of this court entered October 3, 2003, and upon full consideration of the pleadings and papers filed, this court's Orders, the oral motion of the plaintiff at the conclusion of the plaintiffs case-in-chief, the evidence admitted on behalf of the parties, the authorities cited, and the oral arguments of counsel of record for the parties, for the reasons stated from the bench, which are incorporated by reference in the attached copy of the transcript of the court's decision in this action.

IT IS HEREBY ORDERED that judgment is rendered in favor of the plaintiff Metropolitan Washington Airports Authority and against the defendant Washington-Dulles Transportation, Ltd. in the sum of **$1,132,103.73**, which sum is comprised of: (a) $410,787.64 for percentage fee and profit sharing payments due the plaintiff for the Contract Year of November 1, 1998 through October 31, 1999 and $283,037.73 in penalties and accrued interest thereon through

October 22, 2003; and (b) $277,726.80 for percentage fee and profit sharing payments due the plaintiff for the Contract Year Extension of November 1, 1999 through July 31, 2000 and $160,551.56 in penalties and interest accrued thereon through October 22, 2003; plus interest accruing on the sum of **$1,132,103.73** at the rate of 9% per annum beginning October 23, 2003 and continuing thereafter until paid and satisfied in full, plus attorney's fees and expenses of $79,077.45, plus statutory costs of $401.00.

AND THIS ORDER IS FINAL.

ENTERED this 31st day of October, 2003.

/s/ Stanley P. Klein
STANLEY P. KLEIN
CIRCUIT COURT JUDGE

SEEN AND ALL OF THE PARTIES' OBJECTIONS PRESERVED AS SET FORTH IN THE RECORD OF THE PROCEEDINGS IN THIS ACTION, INCLUDING WITHOUT LIMITATION OBJECTIONS MADE DURING THE TRIAL OF THIS ACTION:

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